DOCKET NO.: FST-CV-15-5014808-S	)	SUPERIOR COURT
	)	
WILLIAM A. LOMAS	)	JUDICIAL DISTRICT OF
	)	STAMFORD/NORWALK
Plaintiff,	)	
	)	
v.	)	AT STAMFORD
	)	
PARTNER WEALTH MANAGEMENT, LLC, KEVIN G. BURNS, JAMES PRATT-HEANEY, WILLIAM P. LOFTUS	)	
	)	MARCH 28, 2016
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE

I. INTRODUCTION

Plaintiff, William A. Lomas ("Lomas") submits this memorandum of law in opposition to Defendants' Motion to Strike (the "Motion" or "MTS") counts two, three, four, five and six of Plaintiff's Amended Complaint. The Motion should be denied for each of the following reasons:

- Count II -- Lomas has pled a cause of action for breach of fiduciary duty because he has alleged that Defendants, as either members and/or managers of Partner Wealth Management, LLC ("PWM"), owed him, each other and the LLC itself fiduciary duties. Additionally, Defendants' own emails demonstrate that they considered themselves to be "partners," thus reinforcing their understanding that they owed one another the highest degree of fidelity in their ownership, management and operation of PWM.
- Count III -- Lomas has pled a cause of action for willful and wanton conduct because he has alleged that he and Defendants agreed to equal ownership in PWM, that the Defendants agreed to the terms upon which that ownership interest would be valued and repurchased if a member withdrew, and Defendants not only failed to honor their

obligations, but intentionally and willfully designed a scheme to avoid those obligations with reckless indifference to Lomas' rights, all as revealed in their e-mails.

- Count IV -- Lomas has pled a cause of action for oppression because he has alleged that Defendants, acting in their own self-interest, altered the equal ownership interest and its accompanying valuation in contravention of the Agreement. Lomas has alleged that Defendants' conduct defeated his reasonable expectation that the structure and valuation memorialized in the Agreement -- upon which PWM was founded and in effect at the time Lomas tendered his resignation -- would not be subject to later amendment.
- Counts V and VI -- Accounting is a proper cause of action based upon the plain language of the accounting statute and the repeated recognition of accounting claims by the courts. It is also practically insignificant to strike an accounting count while it remains in the case as a remedy.

II. RELEVANT FACTUAL BACKGROUND

The following facts are taken from the Amended Complaint ("AC", Dkt. No. 136) and must be taken as true and construed most favorably to Lomas. *Kumah v. Brown*, 307 Conn. 620, 626 (2013).

Lomas was a 25% member of PWM until his withdrawal, noticed on October 13, 2014, became effective on January 14, 2015. AC at ¶ 1. The rights and liabilities of the Members in PWM were determined pursuant to the Connecticut Limited Liability Company Act (the "Act") and the Agreement of Limited Liability Company dated November 30, 2009 (the "Agreement"). AC at ¶¶ 5, 15. The Agreement specifically defined the structure of PWM's management and identified its managers. Article III, Section 3.1 states, "the management and governance of the Company and implementation of this Agreement shall be vested in the Management

Committee." Section 3.2, states, "each member of the Management Committee shall be deemed a Manager for the purposes of the Act and this Agreement."

The Agreement also states that members could withdraw from PWM subject to the provisions of Article VIII of the Agreement, which provides:

> If any Member withdraws from [PWM] for any reason except as provided in Sections 8.2 through 8.4, [PWM] or the remaining Members shall be obligated to purchase from the Member, and the Member shall be obligated to sell to [PWM] or the remaining Members, all of his Interests of [PWM] at the price established in accordance with the provisions of Section 8.7(b). The Company Value to be utilized to determine the purchase price for such Member's Interest shall be the Company Value as of December 31 of the year prior to the year in which withdrawal occurs. Each Member shall give at least three (3) months prior written notice of his desire to withdraw from [PWM].

AC at ¶¶ 17, 18. Upon his withdrawal Lomas was entitled to a payout of $4,159,791.25 representing his 25% interest in PWM, plus interest at 6% if the remaining members decided to pay their obligation over time. AC at ¶¶ 23, 24, 28.

Following Lomas' notice of withdrawal Defendants Kevin Burns ("Burns"), James Pratt-Heaney ("Pratt-Heaney") and William Loftus ("Loftus") took steps carefully and specifically designed to avoid their obligations to Lomas and to deprive him of his rights. AC at ¶ 33.

In a series of e-mails between Burns and PWM's Chief Financial Officer, Jeff Fuhrman ("Fuhrman"), on October 18 and 19, 2014, all of which were copied to Loftus on October 19, 2014, Burns communicated the need to have a "strategy" to deal with Lomas and Pratt-Heaney, who at that time was considering a tender of part of his membership interest to satisfy personal cash needs. AC at ¶ 34. This "strategy" was designed to negate the specific contractual obligation set forth in the Agreement. AC at ¶ 34. In the same e-mail chain, on October 19, 2014, Fuhrman responded:

> The options on Lomas are as follows:

> 1) As per the Partnership Agreement, pay him the estimated $4.25MM plus interest over five years with the first installment coming in around next June.
>
> 2) Pay a reduced amount in a lump-sum in January with the interest going to either a bank or Focus and not Lomas.
>
> * * *
>
> 3) Attempt to negotiate a lower price by fighting him on the terms of the Agreement. Never mind that there is virtually no legal basis for such a position, this will make the transition of clients/cash flow all the more challenging.
>
> * * *
>
> By fighting your partner/adversary on a standing six-year agreement you're also creating an incredible moral hazard. Specifically, why would anyone buy into a partnership that has the potential to be renegotiated every time it doesn't suit your personal interest?
>
> This is simple.

AC at ¶ 35. Burns replied that he didn't appreciate Fuhrman "categorizing us as reneging on a six year old agreement" because "we ALL agreed it needed serious changes and was unworkable three years ago!" In addition, he wrote that "the agreement clearly states 65 percent can change the agreement so that option shouldn't be dismissed either." AC at ¶ 36.

Fuhrman, who was fully involved with the Members' earlier efforts in 2013 to address how annual cash flow should be distributed to the Members as compensation, corrected Burns' self-serving suggestion that the Members had earlier agreed that the valuation of the membership interests needed changes or was unworkable:

> The frustration with the Partnership Agreement was with the current compensation. We fixed that. Hard to argue Bill would have agreed to adversely impact his valuation. If all you needed was three of the four partners to agree to make such a change, then why did it have to wait until the eve of his sale to do so?

AC at ¶ 37. In fact, an earlier Power Point presentation made to the Members on September 13, 2013, confirmed what Fuhrman wrote in reply to Burns. Under the heading, "Guiding Principles," Fuhrman wrote: "Do not impact equity participation." AC at ¶ 38. This statement was included in the Power Point presentation specifically to relieve the concern of any Member that the value of their membership interest might be restructured or amended. The changes made in 2013 were designed solely to change annual compensation in order to foster a performance-based culture, without impacting the already vested equity interests of the Members. AC at ¶ 38.

Thereafter, in emails dated November 21 and 22, 2014, Burns and Loftus revealed that it was self-interest that fueled their plan to cheat Lomas.

On November 21, 2014, Burns wrote:

> I simply can't take on 4 million plus in debt and continue to make significantly less than I would at any brokerage firm. I don't have grandchildren and a happy home so I don't have the luxury of family vacations and trips and time off which is my choice. I plan on killing it the next five years and continuing this break neck pace to get rich. I won't be able to if I do this deal.

The next day, Defendant Loftus wrote:

> The issue…. And none of us realized this at the time … Is that we have to buy Bill out with after tax dollars. Believe me, I've worked the math out., [sic] the deal that he's looking for (I acknowledge that we have a contract and I really want to honor it ALTHOUGH to be fair it was done at the 11 Th hour)) is a bad one for all of us.

AC at ¶ 39. Thus, Defendants ignored their commitment not to touch "equity participation" in favor of their personal and individual interests, and they used the "amendment" provision in the Agreement as their legal justification for cheating Lomas after he had tendered his resignation.

In late December 2014, more than 2 months after Lomas had tendered his resignation and only 3 weeks before its effective date, Burns, Pratt-Heaney, and Loftus for the first time

reviewed a draft amended agreement, which was voted on and approved over Lomas' objection, notwithstanding the "moral hazard." AC at ¶ 42. In an e-mail dated December 26, 2014, Fuhrman wrote to Burns, Pratt-Heaney, and Loftus: "Congratulations all, you have yourself a new partnership agreement. Santa had a busy season so he had to deliver it a day late." AC at ¶ 43.

Defendants' acts were carefully thought out and planned with evil motive, malicious intent and/or reckless indifference to the rights of Lomas and the harm that such actions would cause him. AC at ¶ 52. They were outrageous, malicious and carried out with a willful disregard for Lomas' rights under the terms of the Agreement, and with the intention of causing him severe economic and financial loss. AC at ¶ 53.

III. STANDARD OF REVIEW

"[I]n determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. *Coe v. Board of Education*, 301 Conn. 112, 116-17 (2011). "What is necessarily implied [in an allegation] need not be expressly alleged…" *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 295 Conn. 240, 252-53 (2010). "[P]leadings are construed broadly and realistically, rather than narrowly and technically…" *Downs v. Trias*, 306 Conn. 81, 92 (2012). "If any facts provable under the express and implied allegations in the plaintiff's complaint support a cause of action… the complaint is not vulnerable to a motion to strike." *Bouchard v. People's Bank*, 219 Conn. 465, 471 (1991); *see also Santorso v. Bristol Hospital*, 308 Conn. 338, 349 (2013) (motion must be denied where provable facts support a cause of action). Courts must take "the facts to be those alleged in the complaint… and… construe the complaint in the manner most favorable to sustaining its legal sufficiency." *Santorso v. Bristol*

Hospital at 349. "Where the legal grounds for a motion to strike are dependent upon underlying facts not alleged in the plaintiff's pleadings, the defendant must await the evidence which may be adduced at trial, and the motion should be denied." *Commissioner of Labor v. C.J.M. Services, Inc.*, 268 Conn. 283, 293, 842 A.2d 1124 (2004).

IV. ARGUMENT

A. Defendants owed Plaintiff a fiduciary duty as member-managers of PWM.

There is a split of authority among Connecticut trial courts as to whether members in a limited liability company owe one another fiduciary duties. Neither the Connecticut Supreme Court nor the Connecticut Appellate Court has resolved the matter. Under the circumstances of this case, however, it is likely that the Connecticut Supreme Court would find that Defendants owed fiduciary duties to Lomas and to each other.

First, the assertion that Connecticut courts "have held as a matter of law that a member of a Connecticut Limited Liability Company does not owe a fiduciary duty to its other members" is misleading. While some trial courts have reached this conclusion, others have held that "like a partner in a partnership, a member of a limited liability company has a fiduciary duty to the other members." *See Ruotolo v. Ruotolo*, No. CV095026804, 2009 WL 5698124, *5 (Conn. Super. Ct. Dec. 29, 2009, Jones, J.)[1]; *see also Papallo v. LeFebvre*, No. LLICV1350074455, 2015 WL 7709030, *3 (Conn. Super. Ct. Nov. 2, 2015, Shah, J.) ("under certain circumstances a member of a limited liability company may have a fiduciary duty to other members.")

In general, "a fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." *Hi-Ho Tower, Inc. v. Com-Tronic,*

[1] Unreported decisions cited herein are attached hereto as Exhibit A.

Inc., 225 Conn. 20, 38 (2000). "The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him...." *Falls Church Group, Ltd. v. Cooper & Alcorn, LLP*, 281 Conn. 84, 108-09 (2007). The Connecticut Supreme Court has specifically refused to define a fiduciary relationship in precise detail and in such a manner as to exclude new situations, "choosing instead to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other." *Id.*

Under the Uniform Limited Liability Corporation Act ("ULLCA")[2], members of a member-managed LLC owe a fiduciary duty of loyalty and care to the company and its other members. The ULLCA additionally states that a manager in a manager-managed LLC owes a fiduciary duty to the members. A manager of an LLC – whether a member manager or a non-member manager -- is the equivalent of an officer of a stock corporation. *See Kasper v. Valluzo*, No. FSTCV0750093835, 2011 WL 8883574, *5 (Conn. Super. Ct. Dec. 23, 2011, Tierney, J.) Because there is a no Connecticut statute stating whether a manager of an LLC owes a fiduciary duty to the LLC and the other members, the LLC is controlled by general corporate law. *Id.* (holding that a manager of a manager-managed LLC owes a fiduciary duty to the LLC and its members.)

Here, Lomas has alleged sufficient facts to establish that Defendants, as either members and/or managers of PWM, owed him fiduciary duties. The Agreement specifically states, "each member of the Management Committee shall be deemed a Manager for the purposes of the Act and this Agreement." On its face, the Agreement is clear that Burns, Loftus and Pratt-Heaney were managers of PWM and Defendants' brief admits "each of the [members] held equal… management voting rights and served as an officer of PWM."

[2] While Connecticut has not yet adopted the ULLCA, it is instructive in this case.

Therefore, unlike the portion of *Kasper* relied upon by Defendants, Defendants' cited proposition that "a member owes a duty of good faith to the LLC's other members", merely means that if PWM had members other than those on the Management Committee, those non-manager members would not owe fiduciary duties to any other members. But *Kasper* is also clear that because Burns, Loftus, and Pratt-Heaney were all managers of PWM, they each owed Lomas, one another and the LLC itself, fiduciary duties. Thus, as alleged by Lomas, he placed his trust and confidence in the Defendants and Defendants were in a position of superiority and influence. AC at ¶¶ 45, 46, 48. Lomas trusted the Defendants to operate PWM pursuant to the Agreement, to honor their obligations with fidelity, including to buyout his interests according to the Agreement's terms, and not to take steps following his withdrawal to negate, dilute or undermine those obligations in deference to their own self-interests. AC at ¶ 45.

The Agreement states that "each member of the Management Committee shall serve until the earlier of his death, disability, retirement or withdrawal from the Company…" As managers, the Defendants had a special relationship to Lomas owing a fiduciary duty to him as a fellow member. *See Ruotolo* at *5 ("As the managing member of both limited liability companies, defendant had a special relationship with the plaintiff, owing a fiduciary duty to the plaintiff as a fellow member…"); *see also Kasper v. Valluzo,* supra. Lomas fairly expected that Burns, Loftus and Pratt-Heaney would act pursuant to the Agreement, and they violated his trust by amending the Agreement and asserting that even though Lomas had already tendered his notice, the new Agreement now applied retroactively to the value of his 25% interest in PWM. AC at ¶¶ 44-48. By using the Agreement to circumvent their obligations to Lomas, Defendants clearly misused the Agreement for their personal benefit at the expense of Lomas and breached the trust that Lomas had placed in them as the manager-members of PWM. AC at ¶ 48.

Partnership law is also instructive here because despite the strict legal form of their enterprise, the members considered themselves to be partners. Connecticut law recognizes that partners in a partnership owe each other fiduciary duties and, certainly, managing partners owe a fiduciary duty to the partnership and each member. *See Ruotolo,* supra; *Gorelick v. Montanaro*, 119 Conn. App. 785, 806-07 (2010). Burns, Loftus, Pratt-Heaney and Lomas were effectively partners in a partnership, and each was akin to a managing partner of that partnership. Indeed, internal emails authored by their CFO and directed to each of them makes clear that they considered themselves to be partners in a partnership. Fuhrman, continually referred to the "partnership agreement" and Lomas as the Defendants' "partner" ("As per the Partnership Agreement…", "By fighting your partner/adversary…", "Specifically, why would anyone buy into a partnership that has the….", AC ¶ 35; "The frustration with the Partnership Agreement…. If all you needed was three of the four partners…." AC ¶ 37; "Congratulations all, you have yourself a new partnership agreement." AC ¶ 43.) Defendants' continual reference to themselves as partners demonstrates that despite formation as an LLC for purpose of third party liability, the Defendants and Lomas never intended to renounce any fiduciary obligations to each other or the LLC itself.

Therefore, taking all facts pled as true, and drawing all reasonable inferences in favor of Lomas, Lomas has met all of the requirements to plead a breach of fiduciary duty claim, and the Court should deny the Defendants' motion to strike the second count.

B. Defendants' course of conduct rises above a typical breach of contract action and sufficiently alleges that Defendants acted willfully and wantonly by amending the Agreement with the intent to deprive Plaintiff of his buy out rights.

The Motion mischaracterizes Lomas' Amended Complaint as asserting a "straight forward contract action." But Defendants' e-mails – all alleged in the Amended Complaint – demonstrate much more.

It is settled law in Connecticut that "breach of contract founded on tortious conduct may allow the award of punitive damages." *L.F. Pace & Sons, Inc. v. Travelers Indemnity Co.*, 9 Conn. App. 30, 47-48, 514 A.2d 766, cert. denied, 201 Conn. 811, 516 A.2d 886 (1986). "Such tortious conduct must be alleged in terms of wanton and malicious injury, evil motive and violence, for punitive damages may be awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interest of others." *Id.* To allow punitive damages on a claim for breach of contract, "there must be underlying tort or tortious conduct alleged and proved." *Id.* "Elements of tort such as wanton and malicious injury or reckless indifference to the interest of others giving a tortious overtone to a breach of contract action justify an award of punitive or exemplary damages. *Id.* Indeed, a plaintiff may be entitled to punitive damages, attorney fees or costs upon proof of a tortious breach of contract. *Hunt v. Pryor*, 236 Conn. 421, 434, 673 A.2d 514 (1996).

In *L.F. Pace & Sons,* the Connecticut Supreme Court held that "in so refusing in bad faith to give plaintiff said payment and performance bond as represented, and in so misleading plaintiff, the defendant acted outrageously and maliciously toward the plaintiff with willful disregard for plaintiff's rights under the terms of its implied agreement with the plaintiff, and with the intention of causing it severe economic and financial loss." *Id.* at 47. The Court thus held that the trial court properly awarded punitive damages on the plaintiff's action for breach of contract. *Id.* at 46. In so holding, the Court found that the trial court properly looked to plaintiff's complaint, which sufficiently pled tortious conduct by alleging that "defendant acted

outrageously and maliciously toward the plaintiff with willful disregard for plaintiff's rights under the terms of its implied agreement with the plaintiff, and with the intention of causing it severe economic and financial loss." *Id*. at 48-49. The Court found that the lower court's reliance on *Grand Sheet Metal Products Co. v. Protection Mutual Ins. Co.*, was also proper because *Grand Sheet Metal* previously held that "a bad faith breach of contract [gives] rises to a distinct tort claim." 34 Conn. Sup. 46, 372 A.2d 428 (1977). Likewise, the trial court's reliance on *Triangle Sheet Metal Works, Inc. v. Silver* was proper because it held that "an allegation of a motivating intent or design, actual or constructive, on the part of the defendants to harm the plaintiffs by their conduct," while it did not factually exist in *Triangle Sheet Metal* would disclose the existence of "that malicious or wanton misconduct which would justify an award of exemplary or punitive damages." 154 Conn. 116, 128 (1966). Based upon precedent and the specific factual allegations in the complaint, the Supreme Court held the lower court's award of punitive damages was proper.

Since *L.F. Pace & Sons*, at least two Superior Court cases have relied upon its holding. See *Capozzielo v. Post Publishing Co.,* Superior Court, Judicial District of Fairfield at Bridgeport, Docket No. 307141 (November 29, 1994, Rodriguez, J.); *Ruby's, Inc. v. Post Pub. Co.*, No. CV93 0307192S, 1994 WL 685044, at *1 (Conn. Super. Ct. Nov. 29, 1994) (holding "since the plaintiffs' claim for bad faith breach of contract does give rise to a cause of action which sounds partially in tort, an agent such as Thomas may be liable for his alleged tortious conduct.")

Likewise, in *Ruotolo*, the plaintiff alleged that she and the defendant agreed to share equally in the ownership of all assets and income derived from all services provided by the two limited liability companies. 2009 WL 5698124 at *3. Thereafter, defendant failed to meet that

obligation by converting and diverting the property and accounts of one LLC to a third LLC in which plaintiff did not have an ownership interest. *Id.* The Court held that plaintiff sufficiently pled an action for breach of contract with a tortious overtone to support an award of punitive damages by alleging that defendant's actions "were done with premeditation, willfully and by design in order to fraudulently deprive the LLC and plaintiff and that [defendant] devised a fraudulent scheme to cheat the plaintiff out of her 50% share of the LLC and all income derived therefrom." *Id.* at *4. Notably, this case addressed the expectations of joint owners in a limited liability company.

Like *L.F. Pace & Sons*, Lomas has specifically alleged that "Defendants Burns, Pratt-Heaney and Loftus acted outrageously and maliciously toward Lomas with willful disregard for his rights under the terms of the Agreement, and with the intention of causing him severe economic and financial harm." AC at ¶ 53. Lomas has also specifically alleged the facts underlying this allegation more completely in paragraphs 33 through 44. Therefore, like *L.F. Pace & Sons*, Lomas has sufficiently alleged underlying tort or tortious conduct in connection with his claim for breach of contract.

Additionally, similarly to *Ruotolo*, Lomas alleges that he and the Defendants agreed to equal ownership in PWM. AC at ¶¶ 1-4. Lomas also alleges that when PWM was founded, Defendants agreed to the terms upon which that interest would be valued and repurchased if a member withdrew. AC at ¶¶ 15-16, 18-24. Lomas then alleges that the Defendants failed to meet their obligations under the Agreement by undertaking a willful course of conduct to amend, and, in fact, did amend, the buyout terms to deprive Lomas of the value of his 25%. AC at ¶¶ 31, 33-44, 50-53.

Thus, as in *L.F. Pace & Sons* and *Ruotolo*, Lomas has pled an action for breach of contract with a tortious overtone.

The case law relied upon by Defendants is inapt. *Corbett v. Hartford Financial Services Group*, addresses deprivation of compensation, which is not at issue in this case. 2010 Conn. Super. LEXIS 1878 (Conn. Super. Ct. July 26, 2012). While *Corbett* is nearly devoid of factual background, it involved a company that amended its incentive plan after plaintiff had left the company, thus depriving him of compensation he was otherwise due. *Id.* In *Corbett*, unlike in this case, there was no allegation of a conscious intent designed to deprive the plaintiff of his rights. Rather the defendants amended the incentive plan to give them the ability to make a fee rebate adjustment and plaintiff admitted that those changes affected not only him, but others as well. *Id.* at *6. Therefore, the *Corbett* court concluded that the defendant was motivated by self-help and did not act with the specific intent to harm the plaintiff. That logic does not apply here because those facts do not exist here.

Here, Lomas has specifically pled that the Defendants amended the Agreement with the conscious intent, and sole purpose, to deprive him of the value of his 25% interest under the Agreement. AC at ¶¶ 33-44, 50-53. Additionally, unlike in *Corbett*, where the amendment affected the plaintiff as well as others, Lomas has pled the amendment only affected him. AC at ¶¶ 48, 50, 52, 53. The timing in this case is also critical because Defendants amended the agreement on the "eve of Lomas' sale," AC at ¶ 37, after having promised not to do so. AC at ¶ 38. This conduct is different from *Corbett* in which the amendment was made as a business decision and had the collateral effect of depriving previous employees of compensation. Lomas' Amended Complaint contains the implied if not express allegation that the amendment was designed to minimize their obligation to Lomas insofar as they retained the option to amend the

agreement back to its former terms once they had dealt with Lomas, or to adopt new terms in furtherance of future repurchase rights.

Likewise, *Enviro Express v. Bridgeport Resco Co.*, 2001 Conn. Super. LEXIS 407 (Conn. Super. Feb. 15, 2001), is not persuasive here. In *Enviro*, the plaintiff brought a three count complaint alleging breach of contract, violation of CUTPA, and breach of the implied covenant of good faith and fair dealing. *Id.* at *2. While the CUTPA count alleged specific tortious conduct, plaintiff's prayer for relief sought common law punitive damages only in connection with the implied covenant claim *Id*. Because the implied covenant count only incorporated the allegations contained in the breach of contract count, and not the CUTPA count which alleged tortious intent, the Court held that the allegations were insufficient to support plaintiff's contention that defendant's conduct was willfully, recklessly or maliciously tortious and thus struck the prayer for common law punitive damages. *Id.* at *8.

The Court observed that the CUTPA count alleged that in "violating the June 1999 agreement, [defendant] acted with tortious intent because it unilaterally reduced the hauling fee without negotiating a reduction and without giving consideration to [plaintiff's] position. Such conduct, if proven, might well constitute unscrupulous conduct and thus an aggravation of a simple matter of breach of contract." *Id.* at *7 But because this allegation was not incorporated into the implied covenant count upon which punitive damages were based, the Court granted defendant's motion to strike plaintiff's prayer for common law punitive damages. *Id*. However, the Court made clear that a breach of contract action claim can be tortious where unscrupulous conduct is alleged. *Id.* at *7 (allegation that defendant acted with a tortious intent, if proven, "might well constitute an unscrupulous conduct and thus aggravation of a simple matter of breach of contract.")

Unlike *Enviro*, Lomas' willful and wanton misconduct claim incorporates all the former allegations made in his breach of fiduciary duty claim and his breach of contract claim. AC at ¶¶ 1-49. Thus, Lomas has properly incorporated the requisite allegations of his Complaint to ensure that it contains specific, non-conclusory, tortious allegations – the very allegations lacking in *Enviro*. *See* AC at ¶¶ 33-44 (specifically detailing through **Defendants' own emails** the specific tortious conduct that Defendants undertook after Lomas' withdrawal to intentionally deprive him of the value of his 25% interest in PWM).

An additional distinction between *Corbett* and *Ruotolo* that explains the differing outcomes, while not explicit in the decisions themselves, is that *Corbett* involved compensation that was foreseeably susceptible to modification while *Ruotolo* involved a vested equity interest. Another case relied upon by Defendants in their brief supports this distinction. *Welzenbach v. The Hartford Financial Services Group, Inc.* held "the factual allegations of the complaint here that the Defendant terminated the Plaintiff when he was on the verge of being vested in certain benefits and that Defendant did not keep its promise to make him head of the claims department" did not meet the willful, wanton, reckless standard. 2007 Conn. Super. LEXIS 256, *7 (Conn. Super. Ct. Jan. 25, 2007). In other words, had the plaintiff's benefits vested, the Court might well have reached a different holding.

In contrast to *Welzenbach*, Lomas alleges his equity interest was fully vested at the time PWM was formed. AC at ¶ 1. Lomas has additionally alleged that Defendants did not amend the Agreement "until the eve of his sale". AC at ¶ 37. As alleged by Lomas, and stated in Defendants own emails, it is "hard to argue [Lomas] would have agreed to adversely impact his valuation. If all [the Defendants] needed was three of the four partners to agree to make such a change, then why did they wait…" AC at ¶ 37.

Therefore, taking all facts pled as true, and drawing all reasonable inferences in favor of Lomas, Lomas has pled a claim for willful and wanton conduct and the Court should deny the Defendants' motion to strike as to the third count.

C. Plaintiff's oppression claim sufficiently alleges that Defendants subjected him to wrongful conduct and prejudicial treatment as a result of their intentional and continuous course of conduct to deprive him of his buy-out rights under the Agreement.

"Oppressive conduct has been defined as that which defeats the reasonable expectations of a minority shareholder." *Johnson v. Johnson*, 30 Conn. L. Rptr. 260, *5 (Conn. Super. Ct. Aug. 15, 2001) (internal citations omitted). "Oppressive conduct is that which may be described as harsh and wrongful conduct, a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members, or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder is entitled to rely." *Id.*

An action for oppression arises "when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture." *Johnson v. Gibbs Wire & Steel Co.,* No. CV095013295S, 2011 WL 2536480, at *1 (Conn. Super. Ct. May 31, 2011).

In *Booth v. Waltz,* No. CV10 6011749S, 2012 WL 6846552 *22-23 (Conn. Super. Ct. Dec. 14, 2012) the Court held that defendants engaged in oppressive conduct towards the plaintiff because their actions "were significantly inconsistent with and substantially defeated plaintiff's reasonable expectations in a number of respects." The Court cited numerous acts by defendants as oppressive, one of which is directly analogous to the claim in this case. The Court held that plaintiff proved the oppression claim by alleging that defendants had altered the equal ownership interest structure that had served as the foundation for the company. *Id.* at 25. The Court reasoned that the alteration was "something that [plaintiff] never expected and [it] defeated

[plaintiff's] reasonable expectation that he and [defendant's] equity positions would remain equal." Additionally, the Court held the conduct was oppressive because plaintiff had a reasonable expectation that "his founding partner would not act punitively towards him if he decided he wanted to stay involved with the business" and defendant's actions were "wholly inconsistent with and defeated that expectation." *Id.* at 24-25.

Like Booth, Lomas has pled that he never expected the Defendants would alter – at any time, but certainly not after his notice of withdrawal – his equal ownership interest in PWM and its accompanying valuation. AC at ¶ 55. The equal ownership structure and the interest valuation were the foundation for the company and provided the financial assurance upon which each member invested both human and financial capital into PWM. AC at ¶¶ 15, 18-25, 35. Lomas reasonably expected the ownership structure and valuation memorialized in the Agreement would not be subject to later amendment. AC at ¶¶ 35, 37, 38, 45, 55, 56. Lomas' right to a 25% interest in PWM and the buyout obligations outlined in the Agreement were central to his decision to form PWM and the Defendants' amendment to the Agreement substantially defeated those reasonable expectations. AC at ¶¶ 55, 56.

Lomas additionally had a reasonable expectation that Defendants would not act punitively toward him when he decided to withdraw from PWM. Lomas has alleged that Defendants' course of conduct, as detailed in prior counts and incorporated into his oppression claim, frustrated and defeated Lomas' reasonable expectations as a minority member of PWM. Defendants' emails detailed above demonstrate that Defendants amended the Agreement with full awareness that their conduct was harsh and wrongful, lacked probity and fair dealing to the prejudice of Lomas, and was a violation of fair play on which every shareholder is entitled to rely. AC at ¶¶ 1-54, 55, 56.

Therefore, taking all facts pled as true, and drawing all reasonable inferences in favor of Lomas, Lomas has pled a claim for oppression and the Court should deny the Defendants' motion to strike the fourth count of the Amended Complaint.

D. Accounting is a proper cause of action and Plaintiff has sufficiently alleged the necessary elements.

Defendants claim that "an accounting is a remedy and not a cause of action." MTS, p. 2. Their claim is only partially true -- It is certainly a remedy, but it is also a cause of action under Connecticut law. The relevant statute states: "When a judgment is rendered against the defendant in an action for an accounting that he account…" Conn. Gen. Stat. § 52-402 (emphasis added.) The Chapter in which the statute appears is even titled "Actions for Accounting." *See* Conn. Gen. Laws Chapter 907.

Defendants cite *Macomber v. Travelers Property & Casualty Corp.*, 261 Conn. 620, 623, n.3 (2002), for the proposition that an accounting at common law is a remedy and not a claim. But that is not a holding of *Macomber.* In fact, the proposition Defendants rely upon is contained in a footnote, devoid of legal citations, discussing both constructive trusts and accounting. *Id.*

Since that decision, the Connecticut Appellate Court has held that an accounting is a proper cause of action. *Mankert v. Elmatco Products, Inc.*, 84 Conn. App. 456, 460, 854 A.2d 766, *cert. denied*, 271 Conn. 925, 859 A.2d 580 (2004). In *Mankert*, the court held, "to support *an action of accounting*, one of several conditions must exist. There must be a fiduciary relationship, or the existence of a mutual and/or complicated accounts, or a need of discovery, or some other special ground of equitable jurisdiction such as fraud". *Id.* at 460. Following *Mankert,* multiple Superior Court cases have refused to strike causes of action for an accounting. *See AHP Holdings, LLC v. New Meadows Realty Co., LLC,* No. NNH126031174, 2013 WL

1943935 (Conn. Super. Ct. Apr. 22, 2013); *Shames v. Prottas*, No. CV126013378, 2012 WL 6924430 (Conn. Super. Ct. Dec. 27, 2012); *William Raveis Real Estate v. Cendant Mobility Corp.,* No. CV054002709S, 2005 WL 3623815, at *1 (Conn. Super. Ct. Dec. 6, 2005).

Furthermore, the Amended Complaint alleges the necessary elements; *i.e.,* that Defendants owed Lomas fiduciary duties and that they acted in their own self-interest pursuant to an intentional course of conduct to deprive Lomas of his buyout rights under the Agreement. AC at ¶¶ 33-49, 50-53. Thus, Defendants must be subject to an accounting to confirm whether the amounts they purported to receive pursuant to the Agreement, and which Lomas necessarily needs to calculate the value of his 25% interest in PWM, are accurate. Finally, while discovery has yielded some documents with the relevant information, an accounting is the most appropriate means of obtaining the necessary information since as clear adversarial parties, a mere demand on Defendants does not ensure that Lomas' interest is properly valued.

Accordingly, based upon (i) the statutory language of Conn. Gen. Stat. § 52-402; (ii) the limited value of the dicta in *Macomber;* (iii) the fact that Connecticut courts' continue to recognize accounting claims after *Macomber;* (iv) the fact that accounting claims require pleading specific elements, which have been pled here; and (v) the overall insignificance of striking an accounting cause of action while allowing it to remain as a remedy (which Defendants have not moved to strike), the Court should deny the Defendants' motion to strike the fifth and sixth counts of the Amended Complaint.

V. CONCLUSION

For the foregoing reasons, Plaintiff William A. Lomas respectfully requests that the Court deny Defendants' Motion to Strike.

THE PLAINTIFF,
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CERTIFICATE OF SERVICE

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Exhibit A

2013 WL 1943935

Superior Court of Connecticut,
Judicial District of New Haven.

AHP HOLDINGS, LLC
v.
NEW MEADOWS REALTY CO., LLC.

No. NNH126031174.
|
April 22, 2013.

Opinion

ZEMETIS, J.

***1** The defendants' move to strike the plaintiff's amended complaint on the ground that the plaintiff's claims are insufficient to state claims upon which relief can be granted because the plaintiff has failed to allege a necessary predicate fact. The court denies the defendants' motion to strike as to Counts 1, 2 and 4 and grants the motion to strike as to Count 3 for the reasons stated herein.

BACKGROUND

On September 26, 2012, the plaintiff, AHP Holdings, LLC (AHP), filed a four-count amended complaint against the defendants New Meadows Realty Company (New Meadows) and Carabetta Enterprises, Inc. (Carabetta Enterprises). The plaintiff alleges the following facts in its complaint.

New Meadows is a limited partnership that is managed by Carabetta Enterprises, its general partner. Through Carabetta Enterprises, New Meadows has refused to recognize the plaintiff as the assignee limited partner of a 7.5 percent interest in New Meadows that it obtained by way of three 2007 transfers to the plaintiff of three limited partners' complete rights in and to New Meadows. [1] These transferring limited partners (the transferors) notified Joseph Carabetta, secretary and treasurer of Carabetta Enterprises, of the transfers and requested that the plaintiff be recognized as a substitute limited partner holding both economic and non-economic rights in and to their limited partnership units. On or about July 9, 2008, the plaintiff also notified Carabetta of its purchase of the partnership units and asked to be recognized as a substitute limited partner.

Subsequently, on or about November 21, 2008, Carabetta notified the transferors that Carabetta Enterprises did not consent to their attempt to transfer their limited partnership units or to the substitution of the plaintiff as a limited partner in their place. On January 3, 2012, the plaintiff notified Carabetta that it sought to be recognized as an assignee limited partner, holding only the transferors' economics rights. Carabetta Enterprises subsequently offered to acquire the plaintiff's 7.5 percent interest, offering to the plaintiff the amount that the plaintiff paid to acquire the interest, and the plaintiff again demanded to be recognized as an assignee limited partner on February 15, 2012.

Carabetta Enterprises has only consented to the transfer of limited partnership units in situations concerning the death of a partner, a partner's estate planning activities, or in self-dealing transfers to Meriden Family, LLC, an entity that is managed by Carabetta. Carabetta Enterprises has refused to recognize the plaintiff's economic rights, and has continued to treat the transferors as the owners of the plaintiff's partnership interest by distributing profits and tax documents to those individuals. The defendants' refusal to recognize the plaintiff as an assignee limited partner allegedly imposes an administrative burden on the plaintiff and delayed the plaintiff's receipt of distributions, which has resulted in expense and economic loss.

***2** In count one of its complaint, the plaintiff alleges that it is entitled to a declaratory judgment that New Meadows is in violation of General Statutes § 34–27, [2] which pertains to the assignment of partnership interests, for failure to recognize the plaintiff's economic rights in and to the assigned partnership units. Count two alleges that the defendants breached their contractual obligation to the plaintiff as an assignee and also as a third party beneficiary of the contract between the transferors and New Meadows. To this end, the plaintiff seeks specific performance of the contracts that purportedly assign to the plaintiff a 7.5 percent interest in New Meadows. The plaintiff alleges in count three that the defendants' conduct also amounts to a violation of the Connecticut Unfair Trade Practices Act (CUTPA). Lastly, in count four, the plaintiff makes a request for an accounting. In its request for relief, the plaintiff requests that the court: issue a declaratory judgment regarding the parties' legal relationship; order the defendants to recognize the plaintiff as an assignee limited partner; order the defendants to make all

distributions directly to the plaintiff, order the defendants to provide the plaintiff with documents necessary to report its taxable income; order the defendants to provide the plaintiff with an accounting of any distributions of profit and income with regard to the plaintiff's 7.5 percent interest; and order the defendants to pay monetary damages, punitive damages, costs, attorneys fees, and further relief as the court deems proper.

On November 7, 2012, the defendants moved to strike the plaintiff's amended complaint, supported by a memorandum of law, asserting that the plaintiff failed to state a claim upon which relief may be granted. The defendants assert that the plaintiff seeks to enforce its purported economic rights as an assignee of limited partnership interests in New Meadows, but the assignments purport to convey a complete, non-severable package of economic and non-economic interests in the limited partnership. They maintain that because the assignment of complete limited partnership interests are valid only with the consent of the general partner or if authorized by the partnership agreement and Carabetta Enterprises did not consent to the assignment, that the complaint is legally insufficient in the absence of an allegation that the partnership agreement authorized the transfers. The defendants argue that an allegation that the partnership agreement authorized these transfers is a "necessary predicate fact."

In the plaintiff's January 23, 2013 objection to the defendants' motion, the plaintiff asserts that the defendants' refusal to recognize the plaintiff as the assignee of economic rights violates the Connecticut Uniform Limited Partnership Act and Appellate Court authority. The plaintiff also argues that the contract law principle of severability is inapplicable, and that the defendants have failed to distinguish a Superior Court case with similar facts in which the court denied a motion to strike in an assignee's favor.

***3** This matter was heard at short calendar on January 28, 2013. At short calendar, the parties agreed that the transfer of economic interests is valid without the consent of the general partner, and the plaintiff asserted that it seeks only its economic interests and to be recognized as an assignee limited partner that is entitled to said interests, not a substitute limited partner that is also entitled to non-economic interests.

DISCUSSION

"Whenever any party wishes to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted, ... that party may do so by filing a motion to strike the contested pleading or part thereof." Practice Book § 10–39(a). "In ruling on a motion to strike the trial court is limited to considering the grounds specified in the motion"; *Meredith v. Police Commission*, 182 Conn. 138, 140, 438 A.2d 27 (1980); and "[the] motion ... must be considered within the confines of the pleadings and not external documents ... We are limited ... to a consideration of the facts alleged in the complaint." (Internal quotation marks omitted .) *Zirinsky v. Zirinsky*, 87 Conn.App. 257, 268 n. 9, 865 A.2d 488, cert. denied, 273 Conn. 916, 871 A.2d 372 (2005). "Nonetheless, [a]ny plaintiff desiring to make a copy of any document a part of the complaint may, without reciting it or annexing it, refer to it as Exhibit A, B, C, etc., as fully as if it had been set out at length ... A complaint includes all exhibits attached thereto." (Citation omitted; internal quotation marks omitted.) *Tracy v. New Milford Public Schools*, 101 Conn.App. 560, 566, 922 A.2d 280, cert. denied, 284 Conn. 910, 931 A.2d 935 (2007).

"[W]e construe the [complaint] in the manner most favorable to sustaining its legal sufficiency"; (internal quotation marks omitted.) *New London County Mutual Ins. Co. v. Nantes*, 303 Conn. 737, 747, 36 A.3d 224 (2012); and "[w]hat is necessarily implied [in an allegation] need not be expressly alleged." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 295 Conn. 240, 252, 990 A.2d 206 (2010). While "[a] motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged"; (internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC v. Ganim*, 303 Conn. 205, 213, 32 A.3d 296 (2011); "[i]f any facts provable under the express and implied allegations in the plaintiff's complaint support a cause of action ... the complaint is not vulnerable to a motion to strike ." *Bouchard v. People's Bank*, 219 Conn. 465, 471, 594 A.2d 1 (1991). Moreover, "[i]nsofar as [a] ... motion to strike is directed [to] the entire complaint, it must ... fail if any of the plaintiff's claims are legally sufficient ... See also *Whelan v. Whelan*, 41 Conn.Sup. 519, 520, 588 A.2d 251 (1991) [3 Conn. L. Rptr. 135] (court denied motion to strike directed at entire complaint rather than at selected portions)." (Citation omitted; internal quotation marks omitted.) *Lewis v. Royal Bank of Scotland, PLC*, Superior Court, judicial district of Hartford, Docket No. CV 10 6013983 (October 5, 2011, Pellegrino, J.T.R.).

***4** As previously stated, the defendants' motion to strike argues that the plaintiff seeks to enforce its alleged economic rights as an assignee of limited partnership interests in New Meadows, but the assignments purport to convey a complete package of limited partnership interests and do not contain severability clauses that indicate that the partnership interests are divisible. They maintain that because the assignment of complete limited partnership interests are valid only with the consent of the general partner or if authorized by the partnership agreement, and Carabetta Enterprises did not consent to the assignment, that the complaint is legally insufficient in the absence of an allegation that the partnership agreement authorized the transfers.

The plaintiff argues that the defendants' refusal to recognize the plaintiff as the assignee of economic rights violates the Connecticut Uniform Limited Partnership Act, which permits a partner's assignment of rights to the distribution of partnership profits without the consent of other partners, and Appellate Court authority, which has held that one's economic rights in limited partnership units are freely assignable. The plaintiff also argues that the defendants have failed to distinguish *Belveron Partners Fund I, LP v. Augustus Manor Associations Limited Partnership,* Superior Court, complex litigation docket at Hartford, Docket No. X04 CV 09 5032917 (March 31, 2010, Shapiro, J.) [49 Conn. L. Rptr. 647], a case with similar facts in which the court denied a motion to strike in a plaintiff assignee's favor.

I

COUNT ONE: DECLARATORY JUDGMENT

In count one, the plaintiff requests that the court settle the legal relations between the parties and declare that the defendants violated General Statutes § 34–27 by failing to recognize the plaintiff's economic rights. (Am.Compl.¶¶ 43–45.) The plaintiff also alleges that the transferors were permitted to assign their rights to profits and distributions without the consent of other partners. (Am.Compl.¶ 41.)

Pursuant to General Statutes § 52–29(a), "[t]he [S]uperior [C]ourt ... may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed [and] ... [t]he declaration shall have the force of a final judgment ..." Section 34–27, which pertains to the assignment and nature of an assignee's partnership interests, provides in relevant part: "(a) Except as provided in the partnership agreement, a partnership interest is assignable in whole or in part. An assignment of a partnership interest does not ... entitle the assignee to become or to exercise any rights of a partner. An assignment entitles the assignee to receive, to the extent assigned, only the distribution to which the assignor would be entitled ..." A "partnership interest" is "a partner's share of the profits and losses of a limited partnership and the right to receive distributions of partnership assets." General Statutes § 34–9(19).

***5** Our Appellate Court has found that "[w]hile ... a new partner cannot be admitted to a partnership without the consent of the other partners unless the partnership agreement provides otherwise ... a partner may assign his right to the distribution of profits from the partnership without the consent of the other partners." (Footnote omitted; citations omitted.) *Bricklin v. Stengol Corporation,* 1 Conn.App. 656, 667, 476 A.2d 584, cert. denied, 194 Conn. 803, 482 A.2d 709 (1984). *Bricklin* concerned an action for the dissolution of a partnership and the Appellate Court's review of a Superior Court decision denying the plaintiff's interest in a partnership that was to be awarded pursuant to a Florida state judgment. The assignee in that case, plaintiff and purported partner Rebecca Golub, acquired a 7.3 percent interest in the limited partnership Golub Associates by way of a Florida judgment in her divorce from Leo Golub, limited partner of Golub Associates and the purported assignor of Rebecca Golub's interest in the same. "[The Superior] [C]ourt held that the award of the Florida court was not entitled to full faith and credit because ... to do so would be contrary to both Connecticut's and Florida's versions of the Uniform Limited Partnership Act ... requiring consent of all the other partners before admitting a new partner." *Id.,* at 662. On appeal, our Appellate Court found that the trial court erred in failing to accord full faith and credit to the Florida judgment. The Appellate Court held that "[t]he [trial] court [erred in] construi[ing] the [Florida] judgment as making Rebecca Golub a limited partner ... While it is true that a new partner cannot be admitted to a partnership without the consent of the other partners unless the partnership agreement provides otherwise ... a partner may assign his right to the distribution of profits from the partnership without the consent of the other partners." (Citations omitted.) *Id.,* at 667. "Thus, the Florida judgment must be read as awarding Rebecca Golub ... a ... 7.3 percent interest in the *distributions* from the partnership." (Emphasis added.) *Id.,* at 668.

Bricklin is binding on the Superior Court. *Belveron Partners Fund I, LP v. Augustus Manor Associations Limited*

Partnership, supra, Superior Court, Docket No. X04 CV 09 5032917 is consistent with *Bricklin.* In *Belveron,* the Superior Court relied upon the *Bricklin* "court's interpretation of § 34–27 [which] was integral to ... finding that the trial court's construction of ... [the] Florida judgment was in error." *Belveron Partners Fund I, LP v. Augustus Manor Associations Limited Partnership, supra,* Superior Court, Docket No. X04 CV 09 5032917. The facts in *Belveron* are similar to the facts in the present case in that a plaintiff assignee filed a suit against a limited partnership and its general partners subsequent to the defendants' refusal to recognize the plaintiff as an assignee limited partner and pay distributions of partnership profits. The plaintiff alleged a violation of CUTPA and sought declaratory relief, specific performance, damages, an accounting, and other relief with regard to the purported transfer to the plaintiff of a forty-seven percent share of rights in a partnership, including non-economic rights. The defendants moved to strike all counts of the plaintiff's complaint. In finding for the plaintiff, the Superior Court stated: "An explanation for the Appellate Court's view of § 34–27 may be found in the public policy which disfavors restrictions on the alienation of property ... [Moreover], [i]n construing uniform partnership acts, ... [our] Supreme Court has looked to the official commentary ... The official commentary ... [to section 702 of the Revised Uniform Limited Partnership Act, which contains the same language as § 34–27(a),] states ... in relevant part, '[w]hile the first sentence of Section 702 recognizes that the power to assign may be restricted in the partnership agreement, there was no intention to affect in any way the usual rules regarding restraints on alienation of personal property.' " (Citations omitted.) *Id.* "A partner's transferable interest is deemed to be personal property, regardless of the nature of the underlying partnership assets." (Internal quotation marks omitted.) *Id.*

***6** In arguing that the plaintiff's failure to allege that the partnership agreement permitted the transfer renders the claims insufficient to state a cause of action, the defendants in the present case rely *on Tracy v. New Milford Public Schools, supra,* 101 Conn.App. at 560, which they assert stands for the proposition that the failure to plead a predicate fact is fatal to a cause of action. In *Tracy,* the plaintiff brought a wrongful termination action against a former employer, alleging that the employer discharged him in violation of a statute. The trial court granted the defendant school district's motion to strike all three counts of the plaintiff's complaint because the plaintiff failed to allege a necessary predicate fact—that the plaintiff complied with the statutory remedy that was available to him. The Appellate Court affirmed the trial court's judgment, finding that such an allegation was a predicate fact necessary to establish a cause of action and that the absent factual allegation was fatal to the plaintiff's claim. *Tracy v. New Milford Public Schools, supra,* at 565–66. "Without some allegations of predicate facts, statements setting forth ... merely the statutory requirement become conclusory. A pleading must fail if it contains only unsupported conclusions of law without the required underlying facts. And, for purposes of a motion to strike, legal conclusions are not admitted ... [M]erely inserting the magic words of ... acts of ... misconduct by the defendant ... [without] stating the factual basis for that claim is inadequate for purposes of a motion to strike." (Footnote omitted; citations omitted; internal quotation marks omitted.) *Colonial Restaurant Supply, LLC v. Travelers Indemnity Co. of America,* Superior Court, judicial district of New Haven, Docket No. CV 07 5009224 (June 12, 2007, Skolnick, J.T.R.).

Nevertheless, while a party must plead predicate facts to support its cause of action, there is no authority that indicates that the plaintiff in the present case must allege facts pertaining to what is permitted pursuant to the terms of the partnership agreement. *Bricklin* and *Belveron* indicate that the opposite is true—one need not obtain consent to assign its right to the distribution of profits. Moreover, just as the court did in *Belveron,* to the extent that an assignment seeks to assign complete partnership rights without the consent of the other partners, the assignee may obtain only economic rights, thus rendering the package of partnership rights severable. This finding is consistent with the public policy disfavoring restraints on the alienation of personal property.

There are, therefore, no absent factual allegations in the present case. *Bricklin* makes clear that economic rights are fully transferable without consent, and *Belveron* further develops this principle by holding that, without regard to the provisions of the controlling partnership agreement, rights are fully transferable to the extent that they are *economic* rights. The plaintiff has, therefore, sufficiently stated a claim for a declaratory judgment that is premised on a violation of § 34–27. The plaintiff alleges that it was transferred partnership rights and that the defendants have refused to recognize the plaintiff as an assignee limited partner that has the right to collect its share of the partnership's distributions and profits. The plaintiff need not allege that the transfer was permitted by the partnership agreement.

II

COUNT TWO: BREACH OF CONTRACT

***7** "The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages ... *American Express Centurion Bank v. Head*, 115 Conn.App. 10, 15–16, 971 A.2d 90 (2009) ... A bald assertion that the defendant[s] ha[ve] a contractual obligation, without more, is insufficient to survive a motion to strike ... *Commissioner of Labor v. C.J.M. Services, Inc.*, 268 Conn. 283, 293, 842 A.2d 1124 (2004). Nevertheless, the court has determined [that] a breach of contract claim should not be stricken if a plaintiff has set forth a specific contractual obligation and alleged that it had not been met." (Internal quotation marks omitted.) *Bradley Court, LLC v. Alomari*, Superior Court, Docket No. CV 12 6029064 (June 28, 2012, Woods, J.).

In the present case, the plaintiff has alleged that it is a party to New Meadows' partnership agreement, as an assignee who stands in the shoes of the transferors for the purpose of asserting economic rights in the partnership, and has also alleged that it is a third party beneficiary of the partnership agreement with regard to the transferors' relationship with New Meadows. (Am.Compl.¶¶ 47–48.) The plaintiff alleges that the partnership agreement requires New Meadows to allocate profits and make distributions to its limited partners, and thus, New Meadows' failure to do so constitutes a breach of that agreement. (Am.Compl.¶¶ 13, 47–49.) The plaintiff has, therefore, pleaded that the defendants had a specific contractual obligation that was not met, and thus, the plaintiff's claim for breach of the partnership agreement is legally sufficient. Again, contrary to what the defendants argue, the plaintiff is not required to plead that the transfers were authorized by the partnership agreement.

III

COUNT THREE: VIOLATION OF THE CONNECTICUT UNFAIR TRADE PRACTICES ACT

In count three, the plaintiff alleges that the defendants violated General Statutes § 42–110b, which prohibits unfair trade practices, by engaging in "acts and omissions [that] constitute unfair or deceptive acts or practices in the conduct of commerce ..." (Am.Compl.¶ 52.) The plaintiff has alleged that the defendants' acts and omissions offend the public policy of § 34–27 that economic interests in limited partnerships are freely alienable, the practice of only consenting to the transfer of limited partnership units to an entity that is managed by Carabetta constitutes self-dealing, the defendants are motivated by such self-dealing, and the plaintiff has suffered substantial ascertainable economic loss as a result. (Am.Compl.¶ 51.)

Section 42–110b provides in relevant part: "(a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce ..." Our court has stated: "It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1)[W]hether the practice ... offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons] ... All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three ... Thus a violation of CUTPA may be established by showing either an actual deceptive practice ... or a practice amounting to a violation of public policy ... *Ramirez v. Health Net of the Northeast, Inc.*, 285 Conn. 1, 19, 938 A.2d 576 (2008)." (Internal quotation marks omitted.) *Belveron Partners Fund I, LP v. Augustus Manor Associations Limited Partnership, supra*, Superior Court, Docket No. X04 CV 09 5032917 [49 Conn. L. Rptr. 647].

***8** Nevertheless, "absent substantial aggravating circumstances, [a] simple breach of contract is insufficient to establish [a] claim under CUTPA. *Lydall v. Ruschmeyer*, 282 Conn. 209, 248, 919 A.2d 421 (2007) ... [T]he same facts that establish a breach of contract claim may be sufficient to establish a CUTPA violation ... *Lester v. Resort Camplands International, Inc.*, 27 Conn.App. 59, 71, 605 A.2d 550 (1992). However, every contract breach does not amount to a CUTPA violation ... See *Hudson United Bank v. Cinnamon Ridge Corp.*, 81 Conn.App. 557, 570–71, 845 A.2d 417 (2004)." (Internal quotation marks omitted.) *Id.* "When the ... [court] ha[s] permitted a CUTPA cause of action based on a breach of contract, there generally has

been some type of fraudulent behavior accompanying the breach or aggravating circumstances ... Where the allegations are unsupported by sufficient aggravating circumstances necessary to assert a valid CUTPA claim[,] a motion to strike is appropriately granted." (Citations omitted; internal quotation marks omitted.) *Id.*

Similar to the plaintiff in the present case, the plaintiff in *Belveron* alleged that the defendants in that case violated CUTPA by refusing to recognize the plaintiff as an assignee limited partner, in violation of § 34–27 and as part of a self-dealing strategy. The *Belveron* plaintiff argued that such "conduct is injurious to commerce by causing substantial injury to [the plaintiff] ... as an investor and potential reseller of ... [the limited partnership] units ..." *Id.* The court granted the defendants' motion to strike this count, stating: "Without more in terms of factual allegations, the alleged violation of ... § 34–27 amounts to no more than a technical violation in the context of a breach of contract claim, without aggravating circumstances" and the defendants' behavior "d[id] not amount to an unfair trade practice." *Id.*

As previously stated, the plaintiff in the present case also alleges that the defendants engaged in self-dealing and violated § 34–27 by hindering the transferors' ability to assign their economic interests in and to New Meadows. Under *Belveron,* however, such allegations are insufficient to support a cause of action premised on a violation of CUTPA. These allegations, which support the plaintiff's breach of contract claim, do not include an allegation of fraudulent behavior on behalf of the defendants, which is necessary to assert a valid CUTPA claim. The plaintiff has not, therefore, stated a claim upon which relief can be granted.

IV

COUNT FOUR: REQUEST FOR AN ACCOUNTING

In its last claim, the plaintiff requests an accounting, "an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due." (Internal quotation marks omitted.) *Mankert v. Elmatco Products, Inc.,* 84 Conn.App. 456, 460, 854 A.2d 766, cert. denied, 271 Conn. 925, 859 A .2d 580 (2004). "In any judgment or decree for an accounting, the court shall determine the terms and principles upon which such accounting shall be had." General Statutes § 52–401.

***9** "To support an action of accounting, one of several conditions must exist. There must be a fiduciary relationship, or the existence of a mutual and/or complicated accounts, or a need of discovery, or some other special ground of equitable jurisdiction such as fraud ... The right to compel an account in equity exists not only in the case of those relationships which are traditionally regarded as those of trust and confidence, but also in those informal relations which exist whenever one person trusts in, and relies upon, another. The relationship between ... parties to a business agreement ... [has] ... been deemed to involve such confidence and trust so as to entitle one of the parties to an accounting [in equity] ... [*Mankert v. Elmatco Products, Inc., supra,* 84 Conn.App. at 460–61]." (Internal quotation marks omitted.) *Shames v. Prottas,* Superior Court, judicial district of New London, Docket No. CV 12 6013378 (December 27, 2012, Cos grove, J.).

In requesting an accounting, the plaintiff in the present case alleges that the defendants failed to make distributions to the plaintiff, the defendants deny having any obligation to make such distributions, the defendants have failed to provide tax documents indicating income or loss on the limited partnership interest that the plaintiff acquired, the amount that is owed to the plaintiff is not readily ascertainable, and the plaintiff's only means of determining the total amount owed is by way of a court-ordered accounting. (Am.Compl.¶¶ 54–56.) As previously acknowledged, the plaintiff has also alleged that it is a party to a business agreement, New Meadows' partnership agreement, in its capacity as an assignee and third party beneficiary. (Am.Compl.¶¶ 47–48.) The plaintiff has, therefore, alleged that a fiduciary relationship exists between itself and the defendants, which is sufficient to support an action for an accounting.

CONCLUSION

For the foregoing reasons, the court denies the defendants' motion to strike the plaintiff's complaint as to Counts 1, 2 and 4 and grants the motion to strike as to Count 3, and consequently strikes paragraphs 1 .C. and 2 of the Requests for Relief, for the reasons stated herein.

All Citations

Not Reported in A.3d, 2013 WL 1943935, 56 Conn. L. Rptr. 117

Footnotes

1 On November 15, 2007, Nancy Abraham, a limited partner of New Meadows, "sold, transferred, and assigned to [the plaintiff] her economic rights (and all other rights) in and to 1.5 percent of ... [New Meadows'] outstanding [limited partnership] [u]nits," and on November 21, 2007, William Bernhard and Robert Bernhard were limited partners of New Meadows and each "sold, transferred, and assigned to [the plaintiff] ... [their] economic rights (and all other rights) in and to 3.0 percent of ... [New Meadows'] outstanding [limited partnership] [u]nits ..." (Am.Compl.¶¶ 14–22.)

2 "(a) Except as provided in the partnership agreement, a partnership interest is assignable in whole or in part. An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights of a partner. An assignment entitles the assignee to receive, to the extent assigned, only the distribution to which the assignor would be entitled. Except as provided in the partnership agreement, a partner ceases to be a partner upon assignment of all his partnership interest.

"(b) The partnership agreement may provide that a partner's interest in a limited partnership may be evidenced by a certificate of partnership interest issued by the limited partnership and may also provide for the assignment or transfer of any partnership interest represented by such a certificate and make other provisions with respect to such certificates." General Statutes § 34–27.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford.

Mary Ann BOOTH, Exec., et al.
v.
David WALTZ, et al.

No. HHDX04CV106011749S.
|
Dec. 14, 2012.

BRIGHT, J.

I. INTRODUCTION

***1** This case arises out of the ownership and operation of Booth Waltz Enterprises, Inc. ("BWE") and related entities. In 1994, the plaintiff's husband, Frederick W. Booth, Jr, and defendant David Waltz formed BWE to purchase a lubricants supply company called GH Berlin Oil Company. At the outset, Booth and Waltz each owned 50% of BWE. In December 2004, defendant Jeffery Dodge became a 5% shareholder of BWE. In late 2009, Dodge's ownership percentage increased to 7%. As a result, Booth's and Waltz's ownership percentages were reduced to 46.5% each. [1] Prior to Dodge becoming a shareholder of BWE, Booth and Waltz were the sole members of the board of directors of the company. Once Dodge became a shareholder, he also joined the board of directors. From the time of BWE's formation through early 2010 defendant John McNickle acted as an advisor to BWE and/or an "ex officio" member of BWE's board of directors. As more fully discussed below, between 1994 and 2009, Booth and Waltz, and, in one instance Dodge, acquired interests in three limited liability companies that own property associated with BWE's business.

Booth died on March 1, 2010. Shortly after his death, Waltz and Dodge elected McNickle as a director of BWE. Three months after Booth's death, by a complaint dated June 4, 2010, the plaintiff, as executrix for Booth's estate, instituted this action. In the First Count of the complaint, the plaintiff seeks dissolution of BWE pursuant to General Statutes § 33–896(a)(1)(B). In the Second Count, she claims that Waltz, Dodge, and McNickle have breached their obligations to Booth, his Estate, and BWE. In the Third Count, the plaintiff seeks an accounting of BWE. The parties agree that that count is moot in light of the discovery that has taken place in this case. In the Fourth Count, the plaintiff claims that Waltz and Dodge, acting in concert with McNickle, wrongfully usurped control over BWE and converted its revenue and assets for their own benefit. In the Fifth Count, the plaintiff claims that Waltz and Dodge wrongfully took a specific corporate opportunity, the purchase of an interest in a company called KB Page, for their own. In the Sixth Count, the plaintiff seeks the dissolution of the three limited liability companies in which Booth's estate still has an interest. Finally, in the Seventh Count, the plaintiff alleges that Waltz, Dodge and McNickle engaged in a conspiracy to force Booth out of BWE and to cause him to sell his interest in the company at less than its fair market value.

The defendants have denied all of the plaintiff's allegations of wrongdoing. In addition, they have raised a number of special defenses. First, they claim that to the extent they took actions that did not conform to the requirements of BWE's by-laws, Booth acquiesced in and/or consented to those actions. Consequently, the defendants claim that any such claims have been waived or the plaintiff is estopped from making claims based on such conduct. Second, the defendants claim that dissolution of the limited liability companies is not necessary because the defendants have offered to buy the plaintiff's shares in those entities. With respect to the KB Page transaction, the defendants allege that Booth received $25,000 in lieu of participation in that transaction, so the plaintiff has no right to an accounting or any other interest in KB Page. Finally, the defendants claim that no dissolution of BWE is necessary or appropriate because they timely elected to purchase the plaintiff's shares in BWE pursuant to General Statutes § 33–900. In fact, on September 7, 2010, BWE filed and served a notice of election "to purchase, at fair value, all shares of stock of Booth Waltz Enterprises, Inc., owned by the plaintiff, executor of the Estate of Frederick W. Booth, Jr." Ex. 41A.

***2** The case was tried to the court over six days. The court took evidence not only as to the plaintiff's claims regarding the ownership, management and operation of BWE and how the defendants treated Booth, but also as to the proper valuation of the plaintiff's shares in BWE. Evidence was also presented to the court regarding the plaintiff's claim for dissolution of the limited liability companies. Following the

trial, the parties submitted post-trial briefs and reply briefs. The court then requested additional briefing and argument on three specific issues. That final argument occurred on December 5, 2012.

II. FINDINGS OF FACT

In 1994, Booth approached his friend and neighbor Waltz about the possibility of purchasing the GH Berlin Oil Company from Booth's uncle. GH Berlin was in the business of distributing lubricants and related products to commercial enterprises, for example those that provide oil change services for automobiles. The company was financially distressed at the time. Booth and Waltz agreed to purchase GH Berlin and own it in equal shares. They formed BWE to purchase GH Berlin's assets, with each owning 50% of the company's stock. In connection with the start-up of BWE, Booth and Waltz each loaned BWE $75,000. Since the formation of the company, these initial contributions by Booth and Waltz have been recorded in BWE's financial statements as "Loans from Stockholders." Exs. 46–51. Those financial statements consistently identify the loans as demand notes paying interest at the rate of 6% per year. *Id.* They also reflect that interest of $9,000 was paid to each owner each year through 2010. *Id.* [2]

From its inception until 2004, BWE was run informally. Booth was in charge of the company's sales efforts. Waltz was in charge of the operations of the company. The two were the sole directors of BWE. They shared everything equally, receiving the same salary and income distributions. [3] McNickle, who assisted in the formation of BWE, served as an advisor to the company and "ex officio" member of the board of directors. He would attend meetings with Booth and Waltz, and there was an understanding that if Booth and Waltz could not agree on something, McNickle would break the tie. During the time period when Booth and Waltz were the only shareholders of BWE, McNickle never had to perform that tie-breaking function. During this time period, there is little evidence that Booth and Waltz paid much, if any, attention to BWE's by-laws. This is not particularly surprising as there were no major areas of disagreement between them during this time. In fact, both agreed that the strategy of the company was to be conservative with salary and distributions to the shareholders, using earnings instead for growth, both internally and through acquisitions. The strategy worked as BWE grew increasingly large and profitable and acquired a number of related companies, often competitors, year after year. Booth and Waltz seemed to make a perfect team, with Booth recognized as incredibly knowledgeable about the industry and a terrific salesman, and Waltz recognized as a strategic operator of the business. In addition to having a successful business relationship, the personal relationship of Booth and Waltz grew. Their families became close, even traveling and vacationing together.

***3** Over time though, health and personal issues caused Booth to reconsider his role in BWE. In November 1997, Booth suffered cardiac arrest and underwent five bypass surgeries and had a defibrilator implanted in his chest. Despite this significant event, he returned to work in January 1998. Nevertheless, in 2001, Booth informed Waltz that he was considering retirement. A consultant put together a proposal for Waltz to buy out Booth, but Booth decided not to go forward with it. In May 2003, Booth, again considering retirement, discussed with Waltz a possible sale of Booth's interest in BWE to an individual named Rick Meyers, who was also in the industry. Those discussions also failed.

Both following Booth's cardiac arrest and after his discussion of retirement in 2003, BWE began looking for potential employees who could take on a significant role in the company and possibly become shareholders of the company. In 1999, BWE hired Dodge who was working at a similar company in Massachusetts. To incentivize Dodge to join BWE, he was told that there was a possibility for him to become a shareholder of BWE after five years. In November 2003, BWE hired Vince Huschle to manage the sales force, something Booth had done up until then. Huschle was supposed to take direction from and learn from Booth. The goal was ultimately to have someone who could take over full responsibility for BWE's sales when Booth retired. Like Dodge, Huschle was told that he might be given the opportunity to become a shareholder after five years with the company. Although Booth had some conflicts with Huschle after he was hired, Booth agreed to the hiring of Dodge and Huschle. He also agreed to consider selling some of his BWE stock to each of them.

The first real conflict between Booth and Waltz surfaced during 2004. Waltz believed that due to health and personal issues, Booth was not sufficiently contributing to BWE's success. [4] This had a negative effect on the relationship between the two shareholders. Around this same time, McNickle referred Booth to a financial advisor, Robert Thompson. At the time of the referral, Booth had already discussed retiring twice and Huschle had been hired as a

possible replacement for Booth when he retired. Thus, the circumstances confirm McNickle's testimony that he referred Booth to Thompson to assist Booth in planning the best way to exit BWE.[5] The evidence also suggests that McNickle thought that Booth could use an advisor in his dealings with Waltz who, was by nature, more aggressive than Booth.

The issues with Booth's 2004 performance came to a head at a December 27, 2004 board of director's meeting. The meeting was attended by Booth, Waltz, McNickle, and Dodge.[6] At the meeting, Waltz proposed ownership bonuses of $100,000 for Waltz and Booth, and $10,000 for Dodge.[7] Booth agreed. Waltz then proposed performance bonuses of $100,000 for himself, $75,000 for Dodge, and $25,000 for Booth. Ex 7A. Booth disagreed with Waltz's proposal.[8]

***4** At the time that Booth disagreed with Waltz's proposal he and his advisor, Thompson, were aware that BWE's by-laws required that certain actions could only be taken by a 2/3 vote of the stock of BWE. In particular, Section 7 of the by-laws provided, in relevant part that "[n]o action by any officer or by the Board of Directors of the corporation involved in or connected to any of the matters listed below shall be valid unless approved by the affirmative vote of at least two-thirds (2/3) of the shares of the common stock of the corporation issued and outstanding at the time of such vote." Ex. 2, p. 7. Among the matters that required a 2/3 vote was "[e]stablishing or modifying any of the terms of employment of an employee of the corporation who is also an officer, Director or shareholder of the corporation." *Id.*, at p. 8. Because Booth and Waltz were the 50/50 shareholders of BWE in December 2004, changing the terms of their employment, including their compensation, required them to agree on any such changes. In fact, this remained true even after Dodge became a shareholder, because the 2/3 requirement could not be met unless Booth and Waltz voted the same way. Booth never raised the 2/3 requirement with Waltz, instead, simply saying in a hand-written note, the substance of which was dictated by Thompson, "[p]lease be informed that I, F.W. Booth, Jr. (Rick) as a principal and equal owner of G.H. Berlin Oil (Booth–Waltz Enterprises, Inc.) do hereby notify you that A. I do not agree with the proposed bonus arrangement presented to me, Tuesday, Dec. 28, 2004 and, B. Do hereby notify you that I do not intend to sign checks under that proposed bonus arrangement. I am greatly disappointed with the manner in which this was presented and strongly disagree with the proposal." Ex. 7B; Ex. 252.

After receiving Booth's note, Waltz did not further raise the 2004 bonus issue until May 2005. While it is unclear whether Booth's note was the sole reason Waltz abandoned the issue in 2004, the court is convinced, based upon the testimony of Waltz, Dodge, and McNickle, that none of them were aware of the 2/3 vote requirement in the by-laws.[9]

While Booth and Waltz were arguing about performance bonuses in December 2004, they were nonetheless working together to transfer 5% of BWE's stock to Dodge. This was done consistent with the terms on which Dodge was hired. Ex. 8. The transaction was completed as of December 31, 2004. *Id.* Following the transfer, Booth and Waltz each owned 47.5% of BWE's stock.

In connection with the transfer of stock, Dodge and BWE also entered into a Shareholder Agreement dated December 31, 2004. Ex. 39. That agreement gave Dodge the right to purchase additional shares of BWE in the future. In particular, Dodge had the right to purchase an additional 19.9% of BWE's shares during December 2009. Significantly, the agreement provided a methodology for determining the per share price Dodge would have to pay for the shares if he decided to exercise his right to purchase. Section 3 of the Shareholder Agreement provided the following formula: "The Company shall calculate the average EBITDA using actual or estimated results of the operations of the Company for the current fiscal year and the actual results of operations of the Company during the prior calendar year TIMES four (4) LESS the total 'at interest' debt of the Company at the end of the fiscal year period DIVIDED by the total issued and outstanding shares of common stock of the Company. EBITDA shall be determined in the normal industry standards as interpreted by the Company's outside Accountants. The Company may from time to time refine the valuation method in its sole and absolute discretion. Any values determined herein which are disputed by the Internal Revenue Service shall be determined by an independent appraiser or business valuation expert." *Id.* The agreement provided that this same formula would be used for the company to repurchase any shares at Dodge's death. *Id.*, Section 7.

***5** The formula included in Dodge's shareholder agreement was developed by McNickle and Waltz in consultation with BWE's outside accountants William Steele & Associates, P.C. ("Steele"). McNickle consulted Steele because it had experience in valuing companies. In addition, McNickle and Waltz believed that a multiple of EBITDA formula was a reasonable methodology to determine the value of the

company's stock and was fair to other shareholders. In fact, Waltz testified that he believed that the formula would be used if either Booth or Waltz bought the other out. Consistent with this testimony, in February 2005, Waltz made Booth an offer for his stock that was based on the Dodge formula. Ex. 301.

The court draws a similar inference as to Booth. Because Booth and Thompson knew that entering into the shareholder agreement required the unanimous agreement of BWE's shareholders, the court infers that Booth similarly agreed that the formula included in the shareholder agreement was a reasonable methodology for determining the price at which Booth would sell additional shares of BWE stock to Dodge. Furthermore, had Booth felt otherwise he would have sent a written objection to Waltz, just as he had regarding the bonus issue that was under discussion at the same time. The court can see no reason why Booth would believe the formula was appropriate for selling approximately 1,000 of his stock to Dodge, but not appropriate for selling his shares to Waltz. Certainly, not a single document was introduced into evidence suggesting that Booth had any issue with the EBITDA multiple formula. To the contrary, the minutes of the March 24, 2005 annual BWE stockholders meeting reflect that Booth, Waltz and Dodge discussed succession planning, including the potential sale of Booth's stock to Waltz. In connection with that discussion, the minutes reflect that "it was acknowledge [sic] that the adoption of a valuation method (as contained in Mr. Dodge's stockholder agreement) was long over due and will facilitate future transfers of ownership." Ex. 10B.

Despite this evidence, the defendants argue that other evidence shows that Booth never agreed to use that methodology to sell all of his shares to Waltz. Thompson did testify that Booth never agreed to a specific EBITDA calculation in his negotiations with Waltz. However, the evidence established that any objections that Booth had was to the details of how EBITDA might be calculated and not to the use of the formula itself. Booth's comfort with the EBITDA multiple formula was confirmed in late 2009, shortly before his death. At that time, exercising his rights under the shareholder agreement, Dodge purchased an additional 2% of BWE, 1% of which came from Booth, at a price calculated using that formula. [10]

Following the transfer of 5% of BWE's stock to Dodge on December 31, 2004, Dodge joined the company's board of directors. Throughout 2005, Dodge, Waltz, and Booth, as directors, discussed and addressed issues relating to their compensation. The issue first came up at a board of directors meeting on May 9, 2005. At that meeting Waltz revisited the issue of his 2004 bonus. In particular, Waltz sought a $50,000 bonus for his 2004 contributions. Booth strongly opposed Waltz's request, arguing that compensation for partners should be equal. Dodge agreed with Waltz, and the board voted 2 to 1 to approve Waltz's bonus. Ex. 11. While 2/3 of the directors agreed to the bonus, 2/3 of the shares of BWE did not cast votes in favor of this change in Waltz's terms of employment. Despite being aware of this requirement in the bylaws, Booth did not seek to invoke the by-laws as a basis to stop the bonus.

***6** The directors next discussed compensation at a board meeting on November 15, 2005. At that meeting, at which McNickle was also present, they unanimously agreed to a three-part "formula" to deal with compensation. Ex. 205. The formula looked at three components—ownership bonuses, salary, and performance bonuses. Ownership bonuses would be based on company profitability and distributed based on ownership shares. Salary would be based on each person's responsibilities and day to day role. The performance, or yearly, bonus would be based on job effectiveness, overall contribution to the company, and company profitability. *Id.* Thus, Booth changed his position from May and explicitly agreed to a process that could result in differentiated compensation between him and his equal shareholder, Waltz.

This new formula was first used one month later when the directors met to discuss year end compensation for 2005 and salaries for 2006. The minutes of that meeting reflect that Waltz proposed that Booth and Dodge have the same salary going forward and that Waltz receive $50,000 more. Waltz and Dodge voted in favor of this proposal. Booth abstained. Ex. 13A. After a discussion of performance bonuses, Booth proposed that he receive a $40,000 bonus and that Waltz receive a $150,000 bonus. Waltz suggested that his bonus be $125,000, and that Dodge receive a $60,000. The differentiated bonuses were unanimously adopted. *Id.* The records similarly reflect that differentiated bonuses were agreed upon by the three directors in 2006. Ex. 14. Furthermore, there is no evidence of any compensation disputes in 2007 or 2008.

Instead, it appears that between 2006 and 2008 any discussions among Booth, Waltz, and Dodge about the business focused primarily on its continued growth and performance. As part of those discussions, the directors discussed a number of potential acquisitions. Ex. 15. Among

these was KB Page, a distributor of specialty coolants and lubricants. *Id.* Waltz discussed such an acquisition with KB Page's owner, Kevin Barbeau. Barbeau was not interested in selling his business outright to BWE. Instead, he was willing to take on one or two partners who would together have no more than a 50% ownership interest in KB Page. Barbeau also wanted to be the manager of any such entity. Barbeau had known Waltz for about 10 years prior to their discussions in 2007 and knew Dodge from before he was at BWE. Barbeau did not know Booth and had never met him. Ultimately, Barbeau agreed to sell 50% of KB Page to Waltz and Dodge. To consummate the deal, BWE lent Waltz and Dodge $970,000 to acquire their interests in KB Page. As part of the deal, BWE was given an option to purchase Barbeau's remaining 50% of the company. The plan was that once BWE acquired Barbeau's remaining 50%, Waltz and Dodge would also convey their 50% interest in KB Page to BWE. In return, the $970,000 loan to Waltz and Dodge would be forgiven and Dodge would receive additional BWE shares comparable to the value of his KB Page interest. Ex. 16A. Given that the ultimate goal of the transaction was to acquire the assets of KB Page for BWE, BWE advanced funds to Waltz and Dodge so that they could make interest payments on the $970,000 loan they took from BWE to acquire their interest in KB Page. Consequently, BWE in all respects paid for the acquisition of the first 50% of KB Page and, pursuant to the option would pay for the remaining 50% of KB Page. Waltz, Dodge, and Barbeau agreed on a formula to determine the purchase price of the remaining 50% of KB Page. That formula was EBITDA times a multiple less at-interest debt. Ex. 314, Exhibit B. The multiplier to be used would be either 3.2 or 4.5 (plus potential bonuses) depending on when the transaction took place. *Id.*, Ex. 53. Similarly, a side letter agreement with Dodge provided that if Dodge sold his interest in KB Page to BWE under certain circumstances his interest would be valued using the same formula but at a multiple of 3.8. Ex. 313.

***7** Waltz and Dodge concluded their acquisition of 50% of KB Page on April 1, 2008. Booth was fully aware of the terms of the transaction and that Waltz and Dodge were personally going to own 50% of KB Page until BWE bought the other 50% through its option. In light of the fact that Booth would not participate personally in KB Page until BWE exercised its option, BWE paid Booth $25,000 when the transaction occurred.

One other event occurred in 2008 relevant to this dispute. In November 2008, Huschle reached his fifth anniversary as a BWE employee. As promised when Huschle began working for BWE in 2003, the shareholders/directors of BWE considered whether to permit Huschle to purchase shares in BWE. Waltz was in favor of making Huschle an owner. Booth and Dodge disagreed. Consequently, Booth and Dodge voted together to defeat Waltz's motion to make Huschle a shareholder of the company. Instead, because Huschle would have received those shares in exchange for the “sweat equity” he had invested in BWE over the previous five years, the directors awarded Huschle deferred compensation of $285,000. Huschle has not taken that money. He has instead chosen to leave it with the company in the hopes that at some point the shareholders/directors will decide to change their minds and give him stock in BWE in lieu of the money.

In 2009, Booth experienced a medical setback. While on a trip with his wife and the Waltzes in May, Booth suffered congestive heart failure. This led to a number of complications, including a serious attack of gout. Not surprisingly, these health issues negatively affected Booth's performance at work. He was tired and unable to get around. His ability to attend sales calls was greatly diminished. In June, Waltz approached Booth about his health issues and asked whether Booth wanted to sell his shares of BWE. Waltz was insistent with Booth, pushing for an answer by August 1. In one conversation overheard by the plaintiff, Waltz told Booth that he wanted an answer, and if he did not receive one, Waltz would call a directors meeting and Booth would not like the result.

While Booth was considering his options during the summer his health gradually improved. By October or November he had lost 65 pounds and looked in much better shape. His energy was better at work and he was again able to participate more fully in the company's affairs. Nevertheless, Waltz continued to press for a response to his overtures to purchase Booth's shares in BWE. Exs. 18, 20. On December 2, 2009, Booth met with his wife, son, and Thompson to discuss his plans. At that meeting, Booth informed everyone that he was ready to retire. He just wanted to make sure that the price for his shares in BWE was equitable and determined fairly. Rather than advise Booth on an appropriate counterproposal to Waltz, Thompson advised Booth to tell Waltz that he had no intent to retire at this time. Apparently, Thompson believed that taking such a position would put additional pressure on Waltz because of Waltz's commitment to Dodge. Booth followed Thompson's advice and authorized him to send a letter to Waltz that said, “ ‘Rick,’ Frederick W. Booth, Jr., has expressed his intent to remain in his present position as

part owner, executive and board member of Booth Waltz Enterprises, Inc. Rick does not wish to 'formally' retire at the present time." Ex. 22.

***8** The next day, Waltz responded with an e-mail to Thompson, Booth, McNickle, and Dodge expressing his disappointment and informing Booth that the board would "need to clarify [Booth's] day to day role within BWE." Ex. 23. Waltz's response was consistent with the statement he made to Booth and the plaintiff months earlier that if Booth refused to sell his BWE shares to Waltz, Waltz would call a board of directors meeting, and that Booth would not like the results of such a meeting. What occurred next was actually a series of meetings in December 2009 during which Waltz laid out piece by piece the consequences of Booth's decision not to sell. The first meeting occurred on December 7, 2009. At that meeting, the board's first order of business was to acknowledge Booth's "decision not to sell 'at this time.' " Ex. 24. The board then dealt with a number of personnel matters including approving a retroactive pay increase and deferred compensation for Huschle and establishing three regional sales manager positions, all of whom would report to Huschle. *Id.* In addition, Dodge was given the title of VP/ General Manager with overall responsibility for operations. Waltz assumed the title of President and CEO. *Id.* The minutes do not reflect any votes on these personnel changes. Instead, Waltz merely announced the new duties, titles, and responsibilities. Significantly, the minutes reflect no discussion of Booth's ongoing role in the organization other than to say that he would "stay on as a Board Member and Partner." *Id.* Waltz's message to Booth was clear that he would no longer have any significant day to day role in the operations of BWE.

The BWE directors next met on December 14, 2009. At that meeting, the board discussed a proposal by Dodge to exercise his option to purchase additional BWE shares. Ex. 26. Dodge confirmed his intent to purchase the additional 19.9% of BWE stock he was entitled to purchase under his 2004 Shareholders Agreement. He set forth a proposal to purchase those shares on average at the rate of 2% per year over ten years. He also expressed a desire to purchase more "at the appropriate time." Ex. 25. Overall Dodge's intent was "to purchase as many shares as possible, as soon as possible, as funding allows." *Id.* This proposal was, in essence, Dodge's request for an extension to exercise his rights under the 2004 agreement. While Waltz and Dodge voted in favor of the extension, Booth abstained until Thompson could review it. Ex. 26. The board also confirmed the reorganization and role changes discussed at the previous meeting. In particular, the board unanimously approved Waltz's proposal to make Dodge Senior Vice President/General Manager and Waltz CEO/President. *Id.* Once again, there was no discussion of Booth's continued involvement in the operations of the company.

The directors met again one week later on December 21, 2009. Booth moved to approve the acceptance of Dodge's proposal to purchase 2% of BWE stock from Booth and Waltz —each selling 1%. Ex. 27B. The minutes of that meeting reflect that Booth agreed to Dodge's proposal in its entirety. Ex. 27A. This appears unlikely. Booth had discussed Dodge's proposal with the plaintiff and Thompson. Both testified that Booth was not willing to give Dodge more time to purchase additional shares of BWE. Given all that was going on between Booth, Waltz, and Dodge in December 2009, the court believes that this testimony is more credible. [11]

***9** After discussing a number of other business issues, the directors then turned their attention to their own compensation. First, Waltz proposed performance bonuses of $150,000 for himself, $100,000 for Dodge and $0 for Booth. *Id.* When questioned by Booth, Waltz said that his proposal had nothing to do with Rick's decision not to sell his shares, but was based on the directors' relative contributions to the business. *Id.* Based on the evidence presented, the court concludes that this claim was not entirely true. The court finds that Booth's performance in 2009 contributed little to BWE's success. Whether due to health issues, Huschle's greater assumption of sales responsibilities or a general tiring of dealing with Waltz, the evidence was overwhelming that from 2005 forward Booth was less engaged in the business. Nevertheless, his performance in 2008 was not much better than it was in 2009. Yet, Booth received a performance bonus of $40,000 in 2008. Thus, there is no doubt that Booth's decision not to sell his shares to Waltz was a factor in Waltz's recommendation of a zero bonus in 2009. In fact, the evidence shows that Waltz understands that he let the emotions he was experiencing at the time cloud his judgment. McNickle testified that he thought that Waltz regretted not giving Booth some performance bonus. McNickle called the decision not to give Booth a performance bonus a strategic error.

Waltz called his own decision "stupid." Not surprisingly, Waltz and Dodge voted in favor of the 2009 performance bonus proposal. Booth voted against it. *Id.*

Waltz then turned the discussion to salaries. He proposed raising his own salary from $138,000 to $475,000. He proposed raising Dodge's salary from approximately $90,000 to $250,000. He proposed no raise to Booth's salary of $88,000. Waltz claimed that he realized just how underpaid he was during his failed negotiations to buy-out Booth. Booth responded to Waltz's proposal by saying he did not like being locked out. It is clear to the court that Booth saw a clear tie between his decision not to sell and Waltz's proposal to dramatically increase his and Dodge's salaries. Nevertheless, Booth abstained when the other two directors voted to approve the salary increases. The court finds that any claim that there was no link between the salary proposal and the buy-out discussions is disingenuous. The minutes reflect that Waltz particularly discussed his proposal in the context of his buy-out discussions with Booth. In addition, the timing of the salary increase in relation to Booth's decision, leaves no doubt that Waltz was making clear to Booth that his decision not to sell had significant consequences.

Waltz then proposed that BWE pay him deferred compensation of $600,000 for his contributions over the last five years. He also said that such a payment was intended "to balance the equity." *Id.* In essence, Waltz felt that he had contributed more to the company than had Booth over the previous five years and was entitled to a greater ownership interest in BWE than Booth had. Waltz proposed that he be paid the deferred compensation upon retirement, death or change of ownership, further confirming that he viewed it more as an equity premium than salary. He also said that the company's obligation would be subject to proper documentation by the company's attorney. Waltz and Dodge voted in favor of Waltz's proposal. Booth abstained.

***10** The court finds that this proposal was clearly tied to Booth's decision not to sell his shares. Waltz felt that he had carried the company over the previous five years. If Booth was not going to sell all of his shares to Waltz, then Waltz was going to take the value of some of those shares through his proposed deferred compensation plan. McNickle even told Thompson the day after the meeting that the deferred compensation proposal was "because Rick doesn't want to sell his stock." Ex 29.

The board also discussed the third piece of compensation—an ownership distribution. Waltz proposed no such distribution. He claimed that the money should be held back for acquisition opportunities. [12] McNickle, who was present for the meeting, argued with Waltz. He said there was a precedent for making such bonuses in profitable years and proposed a 5% distribution based on expected profits of $2,300,000. Ex. 27A. The minutes reflect that this proposal passed unopposed. Nevertheless, McNickle testified that he still has the scars from his argument with Waltz on this issue. Thus, the court reasonably infers that but for McNickle's intervention, Waltz would have submitted his proposal for a vote. The court also concludes that Dodge would have supported Waltz's proposal. Dodge testified that, because his share of ownership bonuses was so small, he really did not care about them. In light of this, and the fact that Waltz at the same meeting proposed substantial additional compensation for Dodge, there is little question that had McNickle not interceded, Waltz's proposal would have passed and Booth would have seen no ownership bonus. Even though Booth did receive such a bonus of $54,000, the message regarding Waltz's intentions was clear. Booth's continued tenure with BWE would not be pleasant.

In light of the December 2009 meetings, in early 2010 Booth began consulting with attorneys regarding how best to deal with his relationship with BWE, the related limited liability companies, Waltz, and Dodge. Before any actions were taken though, Booth had a fatal heart attack on a business trip to Florida in March 1, 2010. His death left the plaintiff with the decision on how best to proceed. It also caused the remaining directors of BWE and their lawyer to review issues confronting BWE in light of Booth's death. Shortly after Booth's death, BWE's outside attorney, Robert Moran, prepared a memorandum addressing various issues, including future board of directors and officers, shareholders meetings, transactions with Booth's estate, and matters requiring approval of 2/3 of BWE's shareholders. Ex. 34A. All of these issues were discussed by Moran in the context of BWE's by-laws. As to dealing with Booth's estate, Moran wrote: "It will be necessary to obtain from the appointed executor of Rick's estate, or from the executor's attorney, an original certificate evidencing the executor's appointment—until then, there really is no one with whom BWE can discuss, communicate or transact business." *Id.*, at p. 4. Moran's memorandum was delivered to Waltz on or about March 9, 2010. Waltz, Dodge, and McNickle all credibly testified that this was the first they ever had actual knowledge of the 2/3 requirement in the by-laws for certain decisions.

***11** On March 19, 2010, Moran met with Waltz, Dodge, and McNickle to discuss at least some of the issues raised in his memorandum. There is no evidence that this was a

formal board of directors meeting. At the conclusion of the meeting, a Consent In Lieu Of Special Meeting Of the Board OF Directors was prepared, apparently by Moran. Ex. 220. Through that consent, Waltz and Dodge made McNickle a member of the board of directors. They also voted to remove the 2/3 shareholder voting requirement in the by-laws. There is no dispute that the by-laws authorized Dodge and Waltz, as the remaining directors of BWE, to take such actions. There is also no dispute that the plaintiff was unaware of the actions Waltz and Dodge were taking.

The plaintiff made her first request for information about BWE, KB Page and the limited liability corporations in a March 24, 2010 letter to Waltz. Ex. 35A. She also requested that a special shareholders meeting of BWE be scheduled as soon as possible. *Id.* On March 31, 2010, Waltz forwarded the plaintiff's letter to McNickle, Dodge, and Moran. Ex. 35B. At the same time, the plaintiff and Waltz were in communication regarding other issues. For example, BWE and the limited liability companies needed to make various tax filings that required the signature of the executrix of Booth's estate. Exs. 257–58. In connection with these filings, Waltz informed the plaintiff on March 16 and April 2 that BWE and the limited liability companies needed documentation confirming the identity of the estate's executrix. Exs. 258–59. In addition, Waltz asked the plaintiff whether she wished to participate in the purchase of the real property on which BWE's St. Johnsbury, Vermont facility was located. Ex. 258.

On April 5, 2010, the plaintiff sent Waltz an e-mail confirming that she was the executrix of Booth's estate, but noting that the paperwork for her appointment had been delayed. She also renewed her request for information. The plaintiff told Waltz that she could not respond on St. Johnsbury until she received the information requested. The next day, Waltz e-mailed a response to the plaintiff. Ex. 260. That response detailed the reasons why a confirmation of her status as executrix was necessary, explained in greater detail the St. Johnsbury opportunity, the decision making process for BWE, the production of financial documents, and the appointment of McNickle to BWE's board following Booth's death. Waltz sent the plaintiff a second e-mail on April 6, 2010 going into even greater detail about the limited liability companies and the St. Johnsbury property. Ex. 261. Numerous additional e-mails were exchanged between the plaintiff and Waltz over the next two weeks. Exs. 262–64. Ultimately, the plaintiff chose to participate in the transaction, although she claimed to be doing so "under protest." Ex. 264. In response, Waltz gave the plaintiff an opportunity to withdraw from the deal. *Id.* She did not.

Shortly thereafter, on April 23, the plaintiff renewed her request for a special shareholder meeting for BWE. Ex. 266. Waltz responded that same day by telling the plaintiff that there was a "procedure and process for requesting a special shareholder meeting that must be followed." Ex. 37. Waltz did not describe this procedure, but told the plaintiff to contact attorney Moran. *Id.* The evidence shows that there was no special process for requesting such a meeting, and Waltz knew this. Article 1, Section 3 of BWE's by-laws simply provides that "a special meeting of the shareholders ... shall be called by the President upon the written request of one or more shareholders owning, in the aggregate, not less than 10% of the issued and outstanding stock of the corporation." Ex. 203. Moran's March 9, 2010 memorandum specifically informed Waltz of this requirement. Ex. 34B. As of April 23, 2010, the plaintiff, as executrix of Booth's estate was entitled to request such a meeting, and had made such a request in writing. There was no basis for Waltz to not call the meeting. On the other hand, the plaintiff never contacted Moran as Waltz suggested. Had she done so, he would have, in all likelihood, told her exactly what he told Waltz in his March 9, 2010 memorandum. At the very least, having not made that contact, the plaintiff cannot prove that Moran would have thwarted her request for a meeting.

***12** The plaintiff claims that contacting Moran concerned her because recent interactions she had had with Moran had not gone smoothly. For example, the plaintiff finally received her letter testamentary for Booth's estate on or about April 10, 2010. She sent a copy to Moran as part of the documentation necessary to establish her role as executrix. At first, Moran insisted on receiving the original documents along with a letter from the probate court appointing the plaintiff as executrix. When the plaintiff called Moran to discuss the issue he eventually relented and said copies could be faxed to BWE. Based on this, the court does not see a basis for it to find that Moran would have misled the plaintiff regarding her rights to a special shareholders meeting. There was no evidence that the plaintiff did anything further to request a special shareholders meeting after receiving Waltz's e-mail on April 23, 2010.

Waltz did propose a meeting of the shareholders at which a stenographer would be present to record everything that transpired. The plaintiff rejected this offer. [13]

While the relationship between Waltz and the plaintiff was tense and increasingly antagonistic on both sides during the three months between Booth's death and the filing of this suit, it was not entirely so. For example, BWE continued to pay Booth's salary for approximately ten weeks following his death even though it had no legal obligation to do so. Ex. 270. In late April, Waltz offered the plaintiff some of the company's Yankees tickets, which offer the plaintiff accepted. Ex. 265.

BWE also assisted Booth's estate with valuing Booth's interest in BWE for estate settlement inventory purposes. Exs. 38–39. In particular, McNickle, then a director of BWE, sent Moran an e-mail in which he provided a calculation of the value of the estate's share of BWE using the Dodge 2004 agreement. In doing so, he noted that "[t]he EBITDA multiple of four has been commonly used in this industry." Ex. 39. Based on that formula, McNickle determined the value of Booth's 46.5% interest in BWE to be "$5.9 million as of March 1, 2010." *Id.* Waltz was copied on McNickle's e-mail and did not provide any comment to McNickle's analysis. Unlike the calculation McNickle did a few months earlier in connection with Dodge's 2% purchase, the calculation he did for Booth's estate did deduct at interest debt. It also made adjustments for the deferred compensation the directors voted to give Huschle and Waltz, even though the 2004 Agreement makes no reference to such deductions. *Id.* Moran forwarded McNickle's analysis along with the 2004 Agreement on which it was based to the estate's attorney. *Id.*

While almost all of the evidence presented at trial related to BWE, the court did receive some evidence regarding the limited liability companies. The first, Performance Planning, LLC, ("Performance") was formed by Booth and Waltz on November 1, 1999. Ex. 3A. Booth and Waltz were the only members of Performance, each owning 50% of the company. Following Booth's death, Waltz took the position that he was the only member of Performance and that Booth's estate was only an "Economic Interest Owner" as that term is defined in Performance's Operating Agreement. Ex. 3B. Under that agreement, an owner of an economic interest is not entitled to be involved in the management of the affairs of the company. *Id.*, Article I, § (1). However, the operating agreement allows a member to transfer his membership, including by bequest, subject to the written approval of the other members of the company. *Id.*, Article X. Waltz's claim that he is the only member is based on his interpretation that because he has not consented to the transfer of Booth's interest to anyone else, anyone holding his interest is merely the owner of an economic interest and not a member.

***13** The problem is that the agreement does not address the status of a member's estate during the period after the member's death and before any bequest of his interest in the company becomes effective. This is significant because General Statutes § 34–173(a) provides that if a member who is an individual dies, the member's executor or legal representative "may exercise all of the member's rights for the purpose of settling the member's estate or administering the member's property, including any power the member had under the articles of organization or an operating agreement to give an assignment of the right to become a member." Nothing in the operating agreement in anyway limits these statutory rights of a member's executor or legal representative.

The second limited liability company, 155 West Service Road, LLC ("155 West Service Road") was founded by Booth and Waltz on December 10, 2004. Ex. 4A. The parties have stipulated that Booth and Waltz were the only members of the company, each owning 50%. Unlike with Performance, the operating agreement for 155 West Service Road does contain a provision regarding the treatment of a member's estate. *Id.*, at § 4.2. Under that provision, the estate is entitled to the deceased member's share of profits and dissolution proceeds. To become a member the estate's representative would have to petition to become a member after affirming and accepting the terms of the operating agreement. The agreement provides that the company "may, with Manager consent" essentially invite the estate's representative to so petition, but does not require that the company do so. *Id.* There is no evidence that the company ever extended an invitation to Booth's estate to petition to become a member. Nor is there any evidence that the estate made a request to become a member. Thus, upon Booth's death, Waltz became the only member of 155 West Service Road, while Booth's estate retained ownership of Booth's 50% interest in the income and assets of the company.

As noted above, the third limited liability company, Bay Street Property, LLC ("Bay Street") was formed by the plaintiff, as executrix for Booth's estate, Waltz and Dodge in April 2010. Consistent with their ownership percentages in BWE, Booth's estate and Waltz each own 46.5% of Bay Street. Dodge owns 7%. [14] While no operating agreement for Bay Street was placed into evidence, there is no question that Booth's estate is a full member of the company, with the same rights and responsibilities as its other members.

It is undisputed that since Booth's death, none of the limited liability companies have distributed any income, beyond what was necessary to pay taxes, to any of its members or any holder of an economic interest in the companies, including the estate. It is also undisputed that the business of those companies is tied exclusively to BWE. In effect, each acts as a landlord to a BWE facility.

III. DISCUSSION

A. Valuation of Plaintiff's Shares in BWE

***14** The First Count of the plaintiff's complaint seeks a dissolution of BWE pursuant to General Statutes § 33–896(a)(1)(B). This claim was mooted by BWE's election to purchase the plaintiff's shares pursuant to General Statutes § 33–900. Subsection (a) of that statute provides: "In a proceeding under subdivision (1) of subsection (a) of section 33–896 to dissolve a corporation that is not a public corporation, the corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares ." Pursuant to subsection (d) of § 33–900, the fair value of the shares is to be determined "as of the day before the date on which the petition was filed or as of such other date as the court may deem appropriate under the circumstances." Pursuant to subsection (e), after determining the fair value of the plaintiff's shares the court must "enter an order directing the purchase upon such terms and conditions as the court deems appropriate, which may include payment of the purchase price in installments, where necessary in the interest of equity, provision for security to assure payment of the purchase price and any additional costs, fees and expenses as may be awarded ... Interest may be allowed at the rate and from the date determined by the court to be equitable." In addition, the court may award the petitioning shareholder reasonable fees and expenses of counsel and any experts if the court finds that the shareholder had probable grounds for relief under her dissolution claim. *Id.* Pursuant to subsection (f) of the statute, once the court enters the order under subsection (e), "the court shall dismiss the petition to dissolve the corporation under section 33–896."

The parties disagree on the meaning of fair value under the statute. The defendants claim that fair value means fair market value, or the value a willing and able buyer would be willing to pay for the plaintiff's shares in an arms length transaction. According to the defendants, this requires the court to apply both a minority and lack of marketability discount to the value of the plaintiff's shares in BWE. By contrast, the plaintiff claims that § 33–900 says fair value, not fair market value, so such discounts are not appropriate.

Despite this disagreement, the parties agree that the court must first determine the fair value of BWE. To do this, the court must first decide the appropriate date for the valuation. The defendants argue that the valuation should be as of June 30, 2010, the date for which financial records are available that is closest to the date the plaintiff filed her dissolution petition. The plaintiff argues that the valuation date should be December 31, 2010 because Booth's estate was still a shareholder at year end. The court agrees with the defendants that, based on the facts of this case, it is more appropriate to use June 30, 2010 as the valuation date. [15] June 30, 2010 is much closer to the presumptive valuation date set forth in the statute. In addition, the plaintiff fails to explain why December 31, 2010 is any more reasonable than any other valuation date up to the present. Until the court enters its order pursuant to § 33–900(e), the plaintiff is technically still a shareholder. The court has no basis to conclude that December 31, 2010 makes any more sense as a valuation date than December 31, 2011, or any other date after June 30, 2010. Consequently, the court will not depart from the presumptive valuation date under the statute.

***15** Both sides presented expert testimony as to BWE's fair value as of June 2010. The plaintiff offered the testimony of Theresa Simonds of EisnerAmper LLP. The defendants offered the testimony of David Glusman of Marcus Advisory Group. Both experts were eminently qualified and have substantial experience in conducting similar valuations and offering similar opinions. For the most part, both experts had access to the same financial information about BWE and relied on the same data. The differences in their opinions comes primarily from differences in their methodologies.

Simonds' valuation included four components. Simonds used three of these components to determine the fair value of BWE as an operating entity. The first of these components was the EBITDA multiple formula used by the parties in connection with the sale of BWE stock from Booth and Waltz to Dodge. According to Simonds, this formula deserves the greatest weight in determining fair value because the parties themselves had agreed that it was an appropriate method to set the selling and buying price of shares in BWE. Second, Simonds used a capitalization of earnings methodology to

determine the fair value of BWE. Third, she determined the fair value of BWE by calculating the gross margins of two businesses, Fuel Advantage Marketing, Inc. and Fleetserve, acquired by BWE in 2010. Simonds gave twice as much weight to her value based upon the EBITDA multiple method as she did the other two methods. Consequently, Simonds' determination of BWE's value as an operating business was based on 50% of the value determined using that method and 25% of each of the other two methods. After determining the value of BWE as an operating company, Simonds added her fourth component to her fair value analysis. She determined that BWE had two non-operating assets that needed to be added to the valuation. The first was the $970,000 loan BWE made to Dodge and Waltz in connection with their purchase of 50% of KB Page. The second was a timeshare realty interest owned by BWE.

Glusman's valuation was based solely on a capitalization of earnings. Glusman considered using the EBITDA multiple method based on the Dodge sales, but decided it was not applicable because it was not derived in consultation with any professional consultant, CPA, or business valuation expert. Glusman also rejected any consideration of the Fuel Advantage Marketing and Fleetserve transactions as not comparable to the purchase or sale of BWE. Finally, Glusman disagreed that the fair value of BWE should be increased by the KB Page loan or the timeshare interest.

The court believes that there are flaws in both experts' analyses. First, the evidence established that Simonds' reliance on the Fuel Advantage and Fleetserve transactions is misplaced. Those transactions are simply not comparable enough to a sale of BWE to make Simonds' extrapolations from those transactions reliable. For example, BWE purchased the entirety of Fleetserve for $320,000. By contrast, Simonds valued BWE at over $16,000,000. For this and other reasons, the court concludes that it is not appropriate to use the gross profit margin from these companies to determine the value of BWE. Second, Simonds' use of the EBITDA multiple formula departed from that described in the Dodge stock purchase agreement. For example, Simonds did not deduct at interest debt in her calculations. She testified that she did not do so because the parties did not deduct such debt when Dodge made his 2009 stock purchase. At the same time though, she refused to make any inventory adjustments even though the parties had done so in that same transaction. She did not because the Dodge agreement did not provide for such a deduction. Thus, where it favored the plaintiff, Simonds followed the Dodge agreement, where it did not, she followed the parties' actual practice.

***16** Glusman displayed similar advocacy for the defendants. Most glaring was his complete dismissal of the EBITDA multiple formula. As noted above, he did so because of a perceived lack of involvement by any financial professional. He also claimed that after consultation with the defendants and their advisors he believed it was not appropriate to use the formula. This view ignored clear and significant evidence. First, financial professionals were involved in the development of the formula. McNickle and Waltz both testified that they consulted with their outside accountants, Steele, to develop a method to value BWE's shares in connection with Dodge's agreement. McNickle testified that Steele had experience in this area. [16] Glusman also ignored the fact that Waltz viewed the EBITDA formula as a reasonable and fair way to value BWE's shares in connection with a purchase of Booth's stock. He ignored the fact that Waltz made at least one offer based on the formula, and ignored the documentary evidence that Booth, Waltz, and Dodge discussed the use of the formula in future transactions between them. He also ignored the fact that when the plaintiff required a valuation of Booth's shares for estate tax purposes, McNickle, as a director of BWE, determined the valuation using the EBITDA multiple formula. [17]

Based on all of the evidence, Glusman's decision to determine the value of BWE without any consideration of the formula in the Dodge agreement was not reasonable. This is particularly true because it is generally accepted that courts should give significant, if not determinative, weight to any agreement between shareholders regarding valuation. *Stone v. R.E.A.L. Health, P.C.*, Superior Court, judicial district of New Haven, Docket No. CV98–41 49 72 (November 15, 2000, Munro, J.) (29 Conn. L. Rptr. 219) (Quoting Model Business Corporation Act Official Comment to General Statutes § 33–900). While the EBITDA multiple formula was not explicitly included in a written stock purchase agreement between Waltz and Booth, it is clear that the parties understood and accepted it as a fair and reasonable method to determine share value in the event of a sale between them. [18] Consequently, the court concludes that the EBITDA formula should be given as much weight as any other reliable method in calculating the value of BWE.

Given all of the above, the court concludes that the most reliable and equitable way to determine the value of BWE as of June 30, 2010 is to give equal weight to a valuation

determined by using a proper application of the EBITDA multiple formula and one based upon the capitalization of earnings or cash flows. Such an approach eliminates the distorting effects of Simonds' reliance on the Fuel Advantage and Fleetserve transactions, appropriately recognizes the parties' chosen method of valuation in a similar circumstance, and uses as a check a method agreed upon by both experts.

The experts agree on many of the elements of the EBITDA multiple formula. They agree on the numbers for income before taxes, interest expense, depreciation and amortization, and deferred compensation. Ex. 281A. They then each make adjustments to the formula that are, in fact, not part of the formula. For example, Simonds makes an adjustment for gain or loss on disposal of assets. She also adjusts officers' compensation to what she concluded was a reasonable level. She also made an adjustment for perquisites she believed Waltz received that were not tied to the operation of the business. Finally, although she recognized the existence of at interest debt, she failed to deduct it from the valuation calculation. None of these adjustments are consistent with the EBITDA multiple formula as the parties agreed to it in the 2004 Dodge agreement.

***17** Glusman also made unwarranted adjustments to the formula. He made a deduction of $965,971 for an "inventory pick up." He also made a deduction of $885,000 representing the deferred compensation of $285,000 to Huschle and $600,000 to Waltz. The formula in the 2004 Dodge Agreement does not provide for any such adjustments. Glusman testified that such adjustments were appropriate because they were made when Dodge purchased his shares in 2009. The court disagrees. First, while McNickle did make a one-time inventory profit adjustment in connection with Dodge's purchase of stock in 2009, as noted above, he did not deduct at interest debt from his application of the formula. It is not reasonable for Glusman to accept one deviation from the formula but reject another. Second, the financial statements of the company show that large year to year swings in inventory values were not unusual. Exs. 46–48. Consequently, if the parties intended inventory adjustments to be part of the formula on an ongoing basis, one would expect a more formal recognition than McNickle's one-time adjustment. Certainly, McNickle's reference to a one-time adjustment suggests that the parties did not intend such an adjustment to be included as a regular part of the formula. Third, McNickle made no such adjustment when he used the formula to value Booth's shares shortly after his death. Finally, application of the inventory adjustment leads to the absurd result that BWE's value, based on the EBITDA formula before balance sheet adjustments, decreased by approximately 30%, from $14,665,548 to $10,338,328, in the six months between December 31, 2009 and June 30, 2010. There was simply no evidence presented that would support such a conclusion.

The court concludes that deferred compensation adjustments are also unsupportable. First, they are not at interest debt. Second, Huschle's deferred compensation was for five years of work. Consequently, the appropriate adjustment is to apply one-fifth of the amount to a year that: 1) is used in the formula calculation; and 2) for which part of the deferred compensation was paid. That is the methodology that was used by Simonds. Third, Waltz's deferred compensation was not intended by him to constitute salary, but was instead Waltz's attempt "to balance equity." In fact, for the reasons set forth below, it was a completely improper attempt by Waltz in essence to alter the ownership relationship he and Booth had agreed on and followed from the inception of BWE. Finally, Waltz's deferred compensation was never reduced to writing or reviewed by BWE's attorney as the minutes of the December 21, 2009 board of directors meeting required. Consequently, it has no place whatsoever in the EBITDA multiple formula.

Taking all of the above adjustments into account, the court finds that the value of BWE as an operating entity based upon the EBITDA formula included in the Dodge stock agreement to be $13,670,484. [19] This amount will be averaged equally with the valuation the court determines using a capitalized earnings or cash flow methodology.

***18** As discussed above, both experts used a capitalized earnings or cash flow method as part of their valuation methodology. Simonds' analysis focused solely on earnings. Glusman converted earnings to net adjusted cash flows. Simonds used a weighted average of three years to determine expected earnings going forward, whereas Glusman used a weighted average of five years. Simonds used a capitalization rate of 14.25%, compared to Glusman's 14.46% rate. Simonds used a 5% growth rate for the first year after any theoretical acquisition and 3% thereafter. Glusman used a 3% growth rate from the first year.

For several reasons, the court finds that Simonds' analysis, with one minor refinement, to be more credible and reliable. First, the conversion of earnings to adjusted cash flows is misleading. For example, in 2009 a cash flow adjustment of $959,348 was made due to a reduction in long-term debt. The

evidence was that this payment was not something that BWE was required to do. Instead, BWE chose to use its working capital to prepay debt that was not then due. Thus, a potential purchaser of BWE would not view such a payment as a recurring obligation that would reduce earnings or cash flows on a regular basis. BWE could have just as easily distributed the cash used to prepay the debt to its shareholders or retained it for future use. A similar distorting effect occurred in 2008. BWE lent $970,000 to Waltz and Dodge for their purchase of 50% of KB Page. While it is anticipated that BWE may someday see the benefit of that transaction if it exercises its option to purchase Waltz's and Dodge's 50% and Barbeau's remaining 50%, it currently is not realizing a return of that capital expenditure. [20] Thus, adjusting earnings down because of the expenditure artificially reduces the earnings a potential purchaser would consider. This is particularly true because even the interest paid to BWE on the loan is paid from BWE's cash flows.

The court also finds that Simonds' capitalization rate is more reasonable. There are two differences between the experts' rates. First, Simonds used a higher risk-free rate than did Glusman—4.06% to 3.74%. This higher rate appears to be due to a change in 20–year treasury bill rates between June 10, 2010 and June 30, 2010. Whatever the reason, Simonds' use of the higher rate is to the defendants' benefit because, all else being equal, a higher capitalization rate will result in a lower valuation. The second difference results from Glusman's use of a 0.53% industry risk premium. Glusman determined that premium by reviewing Ibbotson Associates' Stocks, Bonds, Bills and Inflation Yearbook, 2010. He applied the industry risk premium in that book for SIC code 5172 (Non–Bulk Petroleum Product Wholesalers). In doing so, he ignored SIC code 5171 which provided a risk premium for bulk petroleum product wholesalers. Whereas the risk premium for SIC 5172 was .53% in 2009, the risk premium for SIC 5171 was (2.60%) for the same year. The evidence was clear that BWE acts as both a bulk and non-bulk wholesaler of products. Giving no weight to its bulk business unfairly distorts the risk premium. This conclusion is confirmed by the fact that selectively choosing one industry code resulted in Glusman coming up with a lower valuation for BWE as of December 31, 2010 than for June 30, 2010. There simply was no evidence about BWE, its operations, or results that would justify such a conclusion. Simonds' explanation that she built the industry risk premium into her 4.0% specific company risk premium was much more credible and reasonable.

***19** The court also finds that Simonds' first year growth rate of 5% is more reasonable than Glusman's 3% growth rate. Simonds' first year growth rate was based on BWE's actual recent performance. Glusman defaulted to a growth rate consistent with the long-term expected growth of inflation.

Furthermore, the court finds Simonds' use of a three-year weighted average for earnings more persuasive. The evidence showed that BWE grew dramatically between 2004 and 2008. While the company's sales and income have continued to grow since 2008, the rate of growth has been much flatter. Even looking at the period from 2006 to 2008, the additional two years Glusman included in his analysis, one can see the significant change in BWE's performance. In 2006 BWE's sales were $47,430,972. In 2008, they were $75,373,842, an increase of almost 60%. During that same period net income nearly doubled, from $1,228,978 to $2,424,127. By contrast, between 2008 and 2010, sales increased by just 13% and net income by approximately 42%. [21] Consequently, the court agrees with Simonds that BWE's performance in 2006 and 2007 provides no insight as to its value in June 2010.

Finally, a review of the year to year result generated by each expert's analysis confirms for the court that Simonds' capitalized earnings approach is more reasonable. Her approach resulted in consistent year to year adjusted earnings that are in line with the testimony the court heard about the company's steady growth and performance. By contrast, Glusman's net adjusted cash flows to equity approach resulted in values ranging from $556,586 and $885,388 between 2006 and 2009. It then showed a value for June 30, 2010 of $2,437,414, almost three times greater than the highest value for any other year. Glusman made no attempt to explain what caused this dramatic change in results. Certainly, the court heard no evidence that would suggest that such a change resulted from some change in BWE's performance. In fact, when one looks at Glusman's calculation of net adjusted cash flows, it is clear that the actual operating performance of BWE, which is what a purchaser is likely to value most, showed consistent performance from 2008 to 2010. The variance in adjusted cash flows between the years is the result almost completely of how BWE chose to spend its cash in 2008 (loan to Waltz and Dodge) and 2009 (prepayment of debt). As noted above, incorporating these expenditures into the analysis unduly distorts, and depresses, the valuation of BWE.

The court does find one fault with Simonds' analysis. She adjusted BWE's earnings by adding back certain credit

card expenses incurred by BWE which she viewed as unsupportable perquisites. There was no evidence to support her conclusion. To the contrary, the evidence showed that while Waltz was reimbursed by BWE for matters charged to his personal credit card, the card was essentially used as the company's credit card. There was no evidence that the purchases made using that card were for anything other than for BWE business. Consequently, the court has adjusted Simonds' capitalized earnings analysis by deducting her perquisites line item from adjusted earnings.

***20** Applying Simonds' capitalization of earnings methodology as discussed above results in a value of $13,142,870 for BWE as an operating entity. For the reasons set forth above, the court will give this value equal weight to the value of $13,670,484 it found by using the EBITDA multiple formula. The result is a value of BWE as an operating entity of $13,406,677.

The court must now address the plaintiff's claim, based on Simonds' opinion, that the value of two "non-operating" assets must be added to this valuation. The first such asset is BWE's interest in a timeshare. Simonds testified that the full purchase price of that timeshare, $62,750, should be added to the valuation. The court disagrees. The plaintiff presented no evidence on the current value of that timeshare. Consequently, even if the court concluded that it should be added to the value of BWE, the plaintiff offered no competent evidence as to its worth. The court will not speculate as to its value. It will, therefore, not be considered.

The second asset Simonds would add to BWE's valuation is the $970,000 demand note due from Waltz and Dodge that was made in connection with their purchase of 50% of KB Page. Simonds opined that any purchaser of BWE would view that asset separately from the value of BWE as an operating company because it does not relate to the company's business. Put another way, a purchaser of BWE would be willing to pay the fair value of the company as an operating entity and then could demand payment of the note in full, adding $970,000 to the value of the acquisition. A seller of BWE, knowing this, would either not sell the loan as part of the transaction or would increase the purchase price by $970,000. Assuming Waltz and Dodge could satisfy the note, a purchaser would be willing to pay the face value for it. Essentially, Simonds would treat the loan no differently than a $970,000 loan BWE made to Waltz to buy a vacation home, or some other non-operating asset BWE might own.

The defendants argue that the loan should not be included for a number of reasons. First, they say it is not part of the EBITDA multiple formula. While that may be true, there is no evidence that the parties even thought about non-operating assets when they developed the formula. Taking the defendants' argument to its logical end, BWE could become a non-operating holding company of non-income producing assets and have a zero valuation under the EBITDA multiple formula. Of course, under that scenario, BWE's value would not be zero. It would be worth the value of the assets it held. Thus, to determine the true value of BWE, the EBITDA multiple formula must be supplemented by adding the value of any non-operating assets held by the company.

Second, the defendants disagree with Simonds' conclusion that the note is a non-operating asset. They claim that through the loan BWE was able to secure business and income from KB Page that it would not otherwise have had. According to the defendants, BWE has realized a gross margin of approximately $100,000 per year flowing from the KB Page transaction. This argument ignores the fact that BWE is not earning any interest on this note as it distributes to Dodge and Waltz the cash necessary to pay the interest. Consequently, any income it receives from doing business with KB Page is largely offset by the fact that it is receiving no other return on the money it lent.

***21** The defendants further argue that the loan is an operating asset because it resulted in BWE having an option to purchase all of KB Page in the future. In fact, the evidence showed that the ultimate goal of Waltz and Dodge buying 50% of KB Page was for BWE to one day own 100% of KB Page. Consequently, the defendants argue that if the court is going to consider adding anything into the valuation of BWE relating to KB Page it should either do so based on 50% of KB Page's earnings or 50% of KB Page's book value.

While the court considered taking one of these two approaches, it concludes that it is not appropriate to do so for one reason. A potential purchaser of BWE would not value the loan based on what KB Page's assets or income is worth. The purchaser would have a right to neither. The purchaser would only have a right to demand payment of the note. Thus, the value of the asset is the value of a demand note from Waltz and Dodge. The value of the loan is its face value of $970,000. It would only be worth less than that if there was a risk that Waltz and Dodge would be unable to satisfy that obligation. There was no evidence that they would have any difficulties in meeting their obligations under the note. Waltz owns 46.5%

of a company worth more than $13 million. Dodge owns 7.5% of the company. Those assets alone are evidence that they could meet their obligations under the loan and that it should not be discounted for a risk of nonpayment.

Finally, the defendants argue that the value of KB Page should not be included in the valuation of BWE, at least where Booth is involved, because Booth received $25,000 to consent to the transaction. Had Waltz and Dodge financed their purchase of KB Page from a source other than BWE, their argument might have merit. They did not though. In essence, Booth, through his ownership in BWE, funded 46.5% of their purchase. He did not give up his right to receive his share of payment of the loan by accepting the $25,000. What he gave up was his right to participate in the activities and earnings of KB Page, unless and until it became an asset of BWE. Currently, those rights belong exclusively to Waltz and Dodge individually, not to BWE or any of its shareholders.

For all of the above reasons, the court concludes that the $970,000 demand note must be included in the valuation of BWE. As a result, the court finds that the fair value of BWE as of June 30, 2010 is $14,376,677.

The plaintiff's 46.5% share of BWE's fair value is $6,685,155. As noted above, the defendants claim this number should be reduced because the plaintiff's shares represent a minority interest and because the shares are not readily marketable. Neither our Supreme Court nor our Appellate Court have addressed the meaning of "fair value" in § 33–900. A few superior court opinions have, and there is a split of authority as to whether a court should make either or both of the deductions claimed by the defendants. For example, in *Johnson v. Johnson*, Superior Court, judicial district of Tolland, Complex Litigation Docket, Docket no. X07 CV 99 0060602S (August 15, 2001, Bishop, J.) (30 Conn. L. Rptr. 260), the court relying, on the Official Comment to § 33–900 of the Model Business Corporation Act determined that a minority discount of 20% was appropriate. And while the court found that the Official Comment would also justify a lack of marketability discount, it concluded that no such discount was warranted based on the facts of the case. *Id.* By contrast, in *DeVivo v. DeVivo*, Superior Court, judicial district of Hartford, Docket No. CV98–0581020 (May 8, 2001, Satter, J.) (30 Conn. L. Rptr. 52), the court, after a thorough and persuasive review of the legislative history of § 33–900 and case law from other states, concluded that a minority discount should not be applied to the value of a petitioning shareholder's shares. And while the court did apply a lack of marketability discount, it said that such discounts should only be applied in "extraordinary circumstances." *Id.*, at 59.

***22** While the court finds the analysis of *DeVivo* most persuasive, it need not resolve the question of whether the discounts should be applied in determining fair value under § 33–900 because it finds that the plaintiff has proven that her dissolution action was based upon oppressive conduct by Waltz and Dodge. The defendants acknowledge that no discounts should be applied to the fair value of the plaintiff's shares in BWE if the court finds oppressive conduct. This is consistent with the Official Comment to the Model Business Corporation Act which provides for potential marketability and minority discounts where there is "no evidence of wrongful conduct." *Johnson v. Johnson, supra*, 30 Conn. L. Rptr. at 263. The rationale for such a rule is clear. Where a dissenting shareholder petitions for relief due to oppressive conduct of the defendant she should not be punished by reducing the value of her stock that she would not otherwise have wanted to sell. Put another way, defendants who engage in oppressive conduct should not be rewarded for that conduct by being permitted to purchase the dissenting shareholder's shares at a fraction of their value.

While neither our Supreme Court nor Appellate Court have defined oppression under either § 33–896 or § 33–900, a number of superior court opinions have discussed the concept with reference to decisions from other states. "Oppression in the context of a dissolution suit suggests a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members, or a visible departure from the standards of fair dealing and a violation of fair play as to which every shareholder who entrusts his money to a company is entitled to rely." (Internal quotation marks omitted) *DeVivo v. DeVivo, supra*, 30 Conn. L. Rptr. at 53–54; see also, *Stone v. R.E.A.L. Health, P. C., supra*, 29 Conn. L. Rptr. at 225. These courts and others have also defined oppression in the context of the petitioning shareholder's reasonable expectations. "Oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture." (Internal quotation marks and cites omitted.) *Johnson v. Gibbs Wire & Steel Co., Inc.*, Superior Court, judicial district of Stamford–Norwalk, Complex Litigation Docket, Docket No. X05 CV 09 5013295S (May 31, 2011, Blawie, J.); see also, *Kanner v. Go Vertical, Inc.*, Superior Court, judicial district of Stamford–Norwalk, Complex Litigation Docket, Docket No.

X05 CV 03 01962636 (September 15, 2005, Rogers, J.). Consistent with the reasonable expectation test, the court in *DeVivo* noted that denying a petitioning shareholder a voice in the decision-making processes of the corporation and thwarting her "reasonable expectations to continue to participate in management" can constitute oppression. *DeVivo v. DeVivo, supra*, 30 Conn. L. Rptr. at 54.

***23** The plaintiff claims that the defendants engaged in several acts of oppression between 2004 and Booth's death in 2010, including failing to provide him with financial records, Waltz verbally abusing him, and Waltz and Dodge increasing their own compensation at the expense of Booth. The plaintiff further claims that the oppression of the estate continued after Booth's death when Waltz refused to call a special shareholders meeting upon the plaintiff's written request and when Waltz and Dodge appointed McNickle to replace Booth as a director of BWE without ever notifying the plaintiff.

The court finds that the plaintiff did not submit sufficient evidence on most of her claims of oppression. In particular, there was little or no evidence that the defendants denied Booth access to BWE's financial records. Similarly, there was no evidence that Waltz's personal interactions with Booth were sufficiently harsh to constitute oppression. The fact that the Booths and Waltzes were still vacationing together as late as May 1999 belies such a claim. Furthermore, the evidence shows that except in 2004 and 2009, Booth agreed with the differentiation in salary and bonuses among the three BWE shareholders. With respect to 2004, although objecting to Waltz's larger bonus, Booth chose to let the issue pass rather than enforce his rights under the by-laws to demand that 2/3 of the shares of BWE vote for such a bonus. The evidence also shows that Booth felt comfortable disagreeing with Waltz, as he did when he voted against allowing Huschle to become a shareholder, a vote in which Dodge joined Booth. Thus, the court finds an absence of any proof of oppression through the middle of 2009. Consistent with this finding, there was no evidence that Booth ever thought of pursuing a dissolution of BWE up until that time.

Things changed significantly following Booth's 2009 congestive heart failure. Waltz began pushing more aggressively than ever for Booth to sell his shares to Waltz. In one phone call overheard by the plaintiff, Waltz threatened Booth with unfavorable action by BWE's board of directors if Booth did not provide a response to Waltz's buy-out proposal. When Booth did respond and indicated that he was not interested in selling, Waltz followed through on those threats. In December 2009, Waltz called a series of board meetings, the effects of which were: 1) to diminish to almost nothing Booth's role in BWE's sales efforts; 2) to more than triple Waltz's salary and nearly triple Dodge's salary, while leaving Booth's salary unchanged; 3) to grant six-figure performance bonuses to Waltz and Dodge, while giving none to Booth; 4) a proposal by Waltz that no ownership bonuses be paid (although Waltz relented after a heated argument with McNickle); 5) changes in various employees' titles, including Waltz and Dodge, emphasizing increased roles for others and a diminished role for Booth; 6) $600,000 in "deferred compensation" to Waltz intended to adjust Waltz's equity position as compared to Booth. With the exception of the changes to Waltz's and Dodge's title, the minutes of the board meetings reflect that Booth did not vote in favor of any of the above changes. In fact, Waltz did not even ask for board approval for the changes to other employee titles and responsibilities. He merely announced them as a fait accompli. He did so despite knowing that Booth expected to remain involved in BWE as not just an owner, but also as a board member and executive of the company. It is no wonder that Booth informed Waltz and Dodge that he felt that he was "being locked out" of the company. Ex. 27.

***24** The question for the court is whether Waltz's and Dodge's actions in December 2009 were so inconsistent with Booth's reasonable expectations as a shareholder that they constituted oppression. To answer that question, the court must first look at what Booth's expectations were when he and Waltz founded BWE. The evidence showed that both shareholders expected to be equal partners in BWE. They would receive equal compensation and distributions and would have equal say in the running of the company. Furthermore, both expected their compensation and distributions to be modest so that BWE could use its earnings for growth and expansion.

The evidence showed that BWE was largely operated consistent with those expectations until December 2009. While changes did occur prior to that time, those changes were consistent with Waltz's and Booth's original plan. For example, while Dodge was sold shares in BWE, Waltz and Booth at all times maintained their equal ownership positions. In addition, while the shareholders agreed to differentiate their levels of compensation based on contributions, particularly following Booth's health problems, the differences in compensation were relatively small, and, overall, compensation and distributions remained modest to preserve cash for corporate acquisitions and

growth. Furthermore, although Huschle was hired, with Booth's approval, to take on many of the company's sales responsibilities, Huschle still reported to Booth, and Booth still had the ability to have a significant say in how the company's sales function was executed. Finally, it should go without saying that at no time did either Booth or Waltz expect that their fellow shareholder would act punitively toward them if they declined an overture to sell their interest in BWE.

Waltz's and Dodge's actions in December 2009 were significantly inconsistent with and substantially defeated Booth's reasonable expectations in a number of respects. First, through the employee changes that Waltz announced, particularly as it related to the company's sales team, Booth was excluded from a function with which he had always been involved and had a reasonable expectation of at least some involvement going forward. Certainly, given his health issues, it would have been unreasonable in December 2009 for Booth to expect the same level of control over sales that he had enjoyed in the early years of BWE. Nevertheless, it was reasonable for him, as an executive and board member of BWE, to have some input into the management of the function for which he had in the past been fully responsible. The evidence shows that in December 2009, Waltz deprived Booth of that input.

Second, Waltz's and Dodge's decision to dramatically increase their compensation substantially defeated Booth's expectations in two respects. First, Booth and Waltz expected at the formation of BWE that their compensation would be the same. While prior to December 2009 they agreed to some differentiations that resulted in greater compensation to Waltz, the differences were not large. For example, in 2009, immediately before Waltz and Dodge voted to increase their salaries, Waltz's salary was $138,000. Booth's was $88,000. Following the December 2009 board meetings Waltz's $475,000 salary was more than five times greater than Booth's salary. There was no evidence that the economics of the company or Waltz's performance as compared to Booth's changed so dramatically in 2009 to justify such a differentiation. Second, the large salaries Waltz and Dodge voted for themselves were inconsistent with Booth's expectations that the shareholders would take modest compensation to preserve the company's cash for acquisitions and growth. While Waltz's and Dodge's salaries might be justified by a comparison to what similarly situated executives were receiving at the time, it was never Booth's and Waltz's expectations that their salaries would be at market levels.

***25** Perhaps most inconsistent with Booth's reasonable expectations was Waltz's and Dodge's vote to grant Waltz deferred compensation of $600,000 to, in Waltz's words, “balance the equity.” Ex. 27A. In essence, Waltz and Dodge voted to alter the equal ownership interest of Booth and Waltz that was the foundation for BWE. This clearly was something that Booth never expected and defeated Booth's reasonable expectation that he and Waltz's equity positions would remain equal.

Finally, the evidence was clear that Waltz's actions in December 2009 were in response to Booth's decision not to sell his shares to Waltz. The minutes reflect such a connection and one can clearly be inferred by the timing of Waltz's actions in relation to when he learned of Booth's decision. Furthermore, McNickle told Thompson that Waltz's demand for deferred compensation was a direct response to Booth's decision. The court finds that the same is true as to Waltz's other actions, particularly his proposal that no ownership bonuses be paid. Booth had a reasonable expectation that his founding partner would not act punitively towards him if he decided he wanted to stay involved with the business. Waltz's actions were wholly inconsistent with and defeated that expectation.

Based on all of the above, the court finds that Waltz and Dodge engaged in oppressive conduct towards Booth in December 2009. The evidence shows that, as a result of that conduct, Booth sought legal counsel, and considered filing this action seeking dissolution prior to his death. Three months after his death, the action was in fact filed by the plaintiff. [22]

Because the court concludes that the plaintiff has proven that her dissolution claim was the result of oppression, the defendant is not entitled to any marketability or minority discounts in the valuation of the plaintiff's shares in BWE. [23] Consequently, the court finds that the fair value of the plaintiff's shares in BWE is $6,685,155.

Having made this determination, the court must determine the terms for BWE's payment for these shares. First, the court concludes that the payment should not be made entirely at once. Given that BWE has not distributed any profits to its shareholders since 2009, the court believes that it should make a significant up front payment to the plaintiff. However,

requiring it to pay the entire amount now would present too great a burden for BWE and would be inconsistent with Booth's and Waltz's philosophy of limiting distributions to owners. For this reason, BWE should have a reasonable period of time to pay off the balance of its purchase obligation to the plaintiff. During that period of time, the plaintiff will be, in essence, a creditor of the company, and an involuntary one at that, given the court's finding of oppression. She is therefore entitled to security and the payment of interest.

The court finds that an equitable rate of interest for payment of any outstanding balance due the plaintiff is 8%. The court bases this determination on a number of factors. First, BWE's financial statements reflect that in 2009 BWE paid off a note from TD Bank with a principal balance of over $600,000. The interest rate on the note was 7.35%. Ex. 50, p. 9.[24] This is the only loan reflected on the financial statements from a commercial lender. Because the plaintiff going forward is similar to that of a commercial lender, and because she will, in effect, be lending millions of dollars to BWE, she is entitled to a comparable rate of interest. Second, unlike TD Bank, the plaintiff is not a willing lender to BWE. The defendant's oppressive conduct caused her to seek dissolution, and the court is permitting BWE to pay her over time. Consequently, she is entitled to a premium over the interest rate a voluntary lender would charge. Finally, the plaintiff has received no distributions of profits from BWE, other than those necessary to pay taxes. Because she has not shared in the profits of BWE over the last three years, she is entitled to receive interest at a fair and equitable rate from the valuation date of June 30, 2010.

***26** With the above parameters determined by the court, the parties will be given an opportunity to submit proposed payment plans to the court. A schedule for submitting such plans is set forth at the conclusion of this memorandum. Upon adoption of a payment plan by the court, the First Count of the complaint will be dismissed pursuant to § 33–900(f).

B. Alleged Wrongful Acts of Waltz, Dodge, and McNickle

In the Second Count of the complaint, the plaintiff asserts individual and derivative claims against Waltz, Dodge, and McNickle claiming that their wrongful conduct has damaged the value of BWE and diverted and taken sums from the corporation. The defendants argue that the derivative claims must be dismissed because the plaintiff never made a proper demand on the board of BWE to pursue such claims.

The court need not reach that issue because there are more fundamental problems with the claim. First, there is absolutely no evidence that McNickle engaged in any wrongful conduct whatsoever. Second, there is no evidence that Waltz and Dodge wrongfully diverted any assets from the corporation. Any compensation they received was approved by the board. While it is true that Booth did not vote for their large salary increases in December 2009, this does not make the payment of those salaries a breach of their fiduciary duties to the corporation. As the plaintiff's own expert testified, the salaries Waltz and Dodge voted themselves in December 2009 were in line with the market salaries paid to comparable executives in comparable companies. This conclusion is in no way inconsistent with the court's conclusion that Waltz and Dodge acted oppressively towards Booth in December 2009. "Minority shareholder oppression is not synonymous with the statutory terms illegal or fraudulent." *Stone, supra,* at 2000 WL 33158565, *9. Waltz and Dodge could engage in conduct frustrating Booth's reasonable expectations without breaching their fiduciary duties to BWE or him. To hold otherwise would require the court to find a breach of fiduciary duty whenever the court finds oppression. That is simply not the law. The closest the plaintiff came to proving a breach of fiduciary duty was the vote by Waltz and Dodge to grant Waltz $600,000 in deferred compensation. Even if this could constitute such a breach, the plaintiff can show no damages because Waltz has not received any of this deferred compensation.

For all of the above reasons, the defendants are entitled to judgment in their favor on the Second Count.

The court reaches the same conclusion as to the Fourth Count. There, the plaintiff claims that Waltz, Dodge, and McNickle have usurped control over the corporation for their own benefit. She seeks the return of money wrongfully expended by the defendants and an order that they not use BWE's assets to defend themselves in this action. Again the claim is asserted derivatively and personally.

Again, there is no evidence that McNickle committed any wrong whatsoever. In fact, it was his action in December 2009 that resulted in Booth receiving an ownership distribution. The court has already addressed the December 2009 votes on Waltz's and Dodge's salaries in connection with the Second Count, and its conclusions are the same here. The only other time that Booth objected to a payment to Waltz was in May 2005 when he voted against Waltz's bonus for 2004. The court

finds though that because Booth was well aware of 2/3 voting requirement in the by-laws and failed to raise that requirement until now, he acquiesced and waived any claim based upon it. Finally, the evidence showed that the defendants have used no BWE assets to defend themselves in this action. For all of these reasons, the defendants are entitled to judgment on the Fourth Count.

***27** In the Seventh Count, the plaintiff seeks damages from an alleged conspiracy among Waltz, Dodge, and McNickle to drive the plaintiff out of BWE. Again, the court finds that the plaintiff has failed to prove this claim. There is no evidence of any such agreement among the defendants. As noted above, McNickle actually protected Booth and argued strenuously with Waltz at the December 21, 2009 board meeting. And while the evidence shows that Dodge went along with Waltz's oppressive conduct in December 2009, the plaintiff has failed to prove by a preponderance of the evidence that Waltz and Dodge entered into an agreement to drive Booth from the company or deprive him of the benefits of being a shareholder. Furthermore, the plaintiff has proven no damages from the alleged conspiracy. Within six months from when Waltz and Dodge engaged in the oppressive conduct she brought this action. Through this action she is receiving the full value of the estate's interest in BWE. [25]

Consequently, judgment shall enter for the defendants on the Seventh Count.

C. KB Page

In the Fifth Count, the plaintiff asserts both individual and derivative claims against the defendants seeking damages from the defendants' alleged diversion of the KB Page opportunity to Waltz and Dodge. This claim is without merit. First, Booth was well aware of the terms of the transaction and agreed to it. He even received a $25,000 payment for agreeing to it. Second, Barbeau was not interested in doing a transaction with BWE. Thus, there was no corporate opportunity to divert. Third, the structure of the transaction has resulted in the plaintiff sharing in the economics of it. Because BWE lent $970,000 to Waltz and Dodge for the transaction, and because the court has concluded that the note, as a non-operating asset, should be included in the valuation of BWE, the plaintiff is receiving his share of the corporate funds used for the transaction. Consequently, judgment shall enter for the defendants on the Fifth Count.

D. The Limited Liability Companies

In the Sixth Count, the plaintiff seeks a dissolution of the limited liability companies. General Statutes § 34–207 provides: “On application by or for a member, the superior court for the judicial district where the principal office of the limited liability company is located may order dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization of the operating company.” The statutes do not provide any instruction or limitation on how the dissolution should proceed.

Given the deteriorating relationship between the plaintiff and Waltz and Dodge, the court finds that it is not reasonably practicable to carry on the business of the limited liability companies in conformity with their articles of organization. This is particularly true because with the plaintiff's sale of the estate's shares in BWE there will no longer be a unity of interest among the members of the limited liability companies. This lack of a common interest is crucial given the purpose for which those companies were founded. Each serves as a landlord to BWE. Thus, when there is commonality of ownership between BWE and the limited liability companies there is no concern that one will be managed to the detriment of the other. Such a concern arises when that commonality is gone. For example, when the same individuals own BWE and the limited liability companies, it makes little difference how BWE's rent is determined. Without commonality, establishing rent could become a significant issue. Those who have no ownership interest in BWE will want the limited liability companies to demand as high a rent as possible. Those with ownership in BWE will have an interest in keeping the rent to a minimum. This divergence in interests leads the court to conclude that it is not reasonably practicable for the plaintiff, soon to be non-owner of BWE, to be a member in the limited liability companies with Waltz and Dodge, who will remain owners of BWE.

***28** Consequently, the court will order a dissolution of the limited liability companies. Given that this is an equitable remedy though, the court must consider how such a dissolution will take place. Given that the companies were established to serve as BWE's landlord and to facilitate BWE's business, the court concludes that it would be inequitable to simply order that the properties owned by the companies be sold. There is no reason to so disrupt BWE's business. In fact, doing so would be counterproductive to the

plaintiff's interests, as she will be getting paid for her shares in BWE over time. The court believes the fairest way to dissolve the limited liability companies is to follow a procedure similar to that used for the purchase of the plaintiff's interest in BWE. Consequently, the court will conduct a hearing at which it will determine the value of the plaintiff's interests in the limited liability companies. It will then set terms for Waltz's (and as to Bay Street, Dodge's) purchase of the plaintiff's interests. In valuing the plaintiff's interests, the court will consider any income of the limited liability companies that has not been disbursed to their members. [26]

E. Claim for Accounting

By virtue of these proceedings and BWE's purchase of the plaintiff's shares in BWE, the plaintiff's claim for an accounting is moot. Consequently, judgment shall enter for the defendants on the Third Count.

IV. CONCLUSION AND ORDERS

For all the foregoing reasons, the court makes the following findings and issues the following orders:

1. Pursuant to BWE's election to purchase the plaintiff's shares in response to the First Count, the court finds the fair value of the plaintiff's shares in BWE to be $6,685,155 as of June 30, 2010. The plaintiff is entitled to the payment of this sum plus 8% interest from June 30, 2010 until the amount is paid in full.

2. The parties shall submit to the court by January 14, 2013 proposed payment plans, including security provisions, for the plaintiff's shares based on the figures in paragraph one.

3. Judgment is entered for the defendants on the Second, Third, Fourth, Fifth and Seventh counts of the complaint.

4. The parties shall submit to the court by January 14, 2013 a proposed schedule for a further hearing on the value of the plaintiff's interests in the limited liability companies in connection with a dissolution of the companies to be ordered pursuant to the Sixth Count.

All Citations

Not Reported in A.3d, 2012 WL 6846552

Footnotes

1 At some point, Waltz's interest was transferred into a family trust.

2 The parties have informed the court that they have resolved the plaintiff's claim for repayment of Booth's initial $75,000 loan.

3 Waltz testified that in 1999 he received a $25,000 year end bonus and Booth's bonus was only $10,000. According to Waltz, Booth recommended these bonuses because his performance was limited in 1999 due to cardiac issues. Waltz offered no corroboration, for example payroll records, to support this claim. In addition, the plaintiff testified that her husband's cardiac arrest occurred in 1997, not 1999. She did not identify any cardiac issues in 1999.

4 Dodge and Huschle also testified that Booth's contributions to BWE dropped after Huschle was hired in 2003. The plaintiff argues that the court should reject this testimony because Dodge and Huschle are both beholden to Waltz, and Dodge, as a defendant, is motivated to diminish Booth's contributions and justify his own behavior. The problem with these arguments is that the plaintiff offered no evidence whatsoever to prove that Booth's performance was not slipping in 2004. The plaintiff did not call a single employee or customer to testify as to Booth's work starting in 2004. Nor did she introduce sales records or other business records to prove Booth's continued effectiveness. Finally, the evidence shows that Booth himself recognized in 2005 that Waltz's contributions to BWE exceeded his own. McNickle testified that Booth told him so at the end of 2005. This testimony was consistent with BWE's board of director meeting minutes which show that Booth suggested a larger bonus for Waltz in 2005. Ex. 13A.

5 Minutes of the Annual Stockholder Meeting held on March 24, 2005 confirm that through 2004 and into 2005 Booth was still considering selling his stock in BWE and retiring. Ex. 10B.

6 It appears that McNickle attended the meeting in his “ex officio” capacity. Dodge was not yet a director when this meeting occurred, but the parties were in the process of finalizing his purchase of shares in the company, which would result in him becoming both a shareholder and director.

7 Again, Dodge was not technically an owner.

8 Exhibit 7A actually says that Booth agreed with Waltz's suggestion. All agree that Booth did not. Based on this and the fact that Dodge was not an owner or director at the time of this meeting, McNickle testified that the exhibit really relates to the year end meeting for 2005. The court doubts this recollection for a couple of reasons. First, there is a different recording of the 2005 year end meeting with different bonus amounts. Ex. 13A. Second, if Ex. 7A relates to the 2005 meeting, it would reflect a vote by Dodge, who was then a director. It does not. It only shows votes by Booth and Waltz.2004 was the last year they were the only directors of BWE. The court thinks it is more likely that the minutes were recorded in error when they reflected Booth's agreement to the differentiated performance bonuses. On December 28, 2004, Booth sent Waltz a hand-written note objecting to the proposed bonuses. Ex. 7B. In any event, what everyone agrees upon is that Waltz proposed a higher bonus for himself than for Booth, and that Booth strongly disagreed.

9 Of course, as a founder and shareholder of BWE, Waltz should have been keenly aware of all of the provisions of the by-laws. The same goes for Dodge once he became an owner and director.

10 McNickle testified that he made an error in applying the formula to Dodge's 2009 purchase. In particular, he failed to deduct “at interest debt.” Thus, the formula was not applied precisely as provided for in the agreement. Nevertheless, it is clear that all involved in the 2009 transfer of stock to Dodge—Booth, Waltz, Dodge, and McNickle—intended to use the formula in calculating the price per share Dodge would pay and Booth and Waltz would accept.

11 The court cannot tell whether the discrepancy between the text of Booth's motion and the minutes is due to a misunderstanding between the directors or the fact that Dodge, as the recorder of the minutes, had an interest in the discussion and vote being recorded a certain way. In either event, Booth's death and this action have made moot whether Booth would have objected to additional purchases by Dodge in the future. Nevertheless, as a result of the unanimous approval of Booth's motion, in or about early 2010, Dodge completed his purchase of an additional 1% of BWE stock from each of Booth and Dodge. The price was determined using the formula set forth in the 2004 agreement. However, McNickle made an error in applying that formula by failing to deduct “at interest debt” from his valuation of the shares Dodge was purchasing. Ex. 52 at exhibit 9. On the other hand, he also included certain elements not identified in the 2004 agreement, including a deduction for a “one time inventory profit.” *Id*

12 Such a justification is not believable in light of the dramatic salary increases proposed by Waltz. Waltz's salary increase alone far exceeded the total annual ownership bonuses BWE typically paid. In addition, because ownership bonuses were not supposed to be tied to individual performance, the only reasonable conclusion one can draw is that Waltz's proposal on ownership bonuses was intended to punish Booth for his decision not to sell. The fact that Waltz and Dodge received substantial performance bonuses and increases in salary, offsetting for them the lack of any ownership bonus, reinforces this conclusion.

13 The evidence shows that on July 23, 2010, a month after this action was instituted, Waltz invited the plaintiff to a BWE directors meeting that was going to take place on July 28. Ex. 273. The plaintiff declined, claiming that the notice provided was inadequate. She also asked that all future communications go through counsel. *Id.* The evidence was unclear whether this is the meeting as to which Waltz suggested a stenographer.

14 At some point Waltz placed many of his assets, including his interests in BWE and the limited liability companies in a family trust. For example, the actual member of Bay Street is the David J. Waltz Trust dated August 20, 1999 (as amended and restated on May 12, 2004). Because ownership by the trust does not affect the court's analysis of any of the issues in this case, for sake of ease, the court has consistently referred to Waltz as owner of the assets even though the trust may own most or all of them.

15 The plaintiff's expert provided a valuation as of June 10, 2010. Nevertheless, her analysis was based on financial data as of June 30, 2010. Based on the testimony of the experts and other evidence presented, the court can discern no material difference between a June 10, 2010 and June 30, 2010 valuation date.

16 In their post-trial reply brief the defendants seek to distant themselves from McNickle's testimony and argue that Steele really has no expertise in business valuations. In support of this claim, the defendants refer the court to Steele's website and criticize the plaintiffs for not offering a Steele partner or manager as a witness. Because the website was not admitted as evidence, the court cannot consider it. In addition, the defendants had as much, if not more, of an opportunity to call a witness from Steele, but chose not to. Thus, the only evidence that the court has regarding Steele is the testimony of McNickle, BWE's long-time advisor and currently one of its directors. Finally, it is worth noting that McNickle is no novice to financial issues. He has been a CPA since the 1970s.

17 Glusman also claimed that the Dodge agreement does not represent an arms length transaction because Dodge had no leverage to negotiate the terms of the agreement. The court disagrees. Dodge was not required to purchase shares in BWE. Nor was he required to remain an employee of BWE. The fact that Waltz and Booth agreed to sell some of their

shares to Dodge is evidence that they viewed him as a highly valued employee. Dodge, thus, had leverage to negotiate his stock purchase agreement. There was no evidence to the contrary.

18 The defendants argue that the court should give little or no weight to the formula because the evidence established that Booth never agreed to use the formula in a sale of his shares to Waltz. As noted above, the evidence showed that Booth did not object to using the formula, but had concerns about how the EBITDA would be calculated in connection with his sale of stock to Waltz.

19 This figure does not take into account Simonds' proposed non-operating assets adjustments for the $970,000 loan to Dodge and Waltz in connection with the KB Page transaction or BWE's timeshare interest. Those possible adjustments will be considered after the court determines the value of BWE as an operating business.

20 The defendants argue that BWE has benefited from the KB Page transaction because it receives income from doing business with KB Page. The evidence was that such income is insignificant, particularly compared to the impact on valuation by adjusting earnings by the cash lent by BWE to Waltz and Dodge.

21 BWE's profits in 2009 were actually down by approximately $200,000 compared to 2008.

22 Given the court's findings that Waltz and Dodge engaged in oppressive conduct prior to Booth's death, the court need not address whether the conduct continued towards the plaintiff following Booth's death, and whether any wrongful conduct towards the plaintiff could support a finding of oppression.

23 In addition, in light of the court's finding of oppression, the plaintiff, pursuant to § 33–900(e), may be entitled to an award of reasonable fees and expenses of her attorneys and expert. The court will schedule a hearing on such an application if one is filed.

24 It appears that the TD Bank loan was entered into by BWE in 2006. While the defendants may argue that interest rates are lower today than they were in 2006, the court has found nothing in the evidence to reflect BWE's current cost of borrowing from a commercial lender. In any event, because the court's determination of an equitable interest rate is based in part on its conclusion that the other two shareholders of BWE engaged in oppressive conduct, BWE's current cost of borrowing would not itself be determinative.

25 In her post-trial brief, the plaintiff requests that the court enter judgment against the defendants in the amount of $3,216,200 representing the plaintiff's share of undistributed profits from BWE. The plaintiff does not say which count of her complaint entitles her to such an award. Nor does the claim fit within any of the claims of the complaint. This is not surprising, given that almost all of any such profits were generated after the complaint was filed. Furthermore, there was no evidence that the defendants had any obligation to distribute those profits. And, as to the conspiracy claim, there was no evidence that the defendants conspired to withhold those profits to drive Booth from BWE. To the contrary, the evidence showed that the decision not to distribute profits was made after the litigation started. Nothing in the plaintiff's torts claims can be reasonably read to cover such period or the defendant's decision.

Theoretically, the plaintiff would have received her share of those profits had BWE been dissolved. BWE's election under § 33–900 though prevents that from happening. The court could perhaps consider those profits in determining the fair value of the plaintiff's shares under § 33–900, but the plaintiff has not requested that the court do so. Even if it had, the proper way to consider the issue would have been for the plaintiff to ask the court to use a more current valuation date and provide evidence as to the valuation of BWE as of the more current date. The plaintiff failed to make such a request or offer any such evidence. Consequently, the court sees no basis to award the plaintiff her claimed share of alleged undistributed profits.

26 Unlike with BWE, the evidence shows that the limited liability companies were established to generate regular income for their members, and had no reason to withhold the income. The evidence shows that Waltz, as manager of the limited liability companies, has not distributed any income since the beginning of this litigation in case the companies needed the money to cover legal expenses. With the litigation coming to end, the court would expect distributions, of past and future income, to resume.

Cited
As of: Jan 28, 2016

Timothy M. Corbett v. Hartford Financial Services Group, Inc. et al.

X07CV116019434S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF HARTFORD AT HARTFORD

2012 Conn. Super. LEXIS 1878

July 26, 2012, Decided
July 26, 2012, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

OVERVIEW: An employee alleged that the employers breached their employment agreement with him by arbitrarily reducing the value of his compensation in his incentive plan. Related claims were asserted as well. In resolving the employers' motion to strike prayers for relief which sought punitive damages and attorneys fees, the court found that the allegations were legally insufficient to state a claim for such relief. There were no factual allegations of wanton and malicious injury to support such awards.

OUTCOME: Motion granted.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Strike > General Overview

[HN1] The purpose of a motion to strike is to test the legal sufficiency of a pleading. The motion to strike contests the legal sufficiency of the allegations of any complaint to state a claim upon which relief can be granted. In addition, it may test the legal sufficiency of any prayer for relief in any such complaint, counterclaim or cross-complaint.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Strike > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

[HN2] A motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by a trial court. It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. For the purpose of ruling upon a motion to strike, the facts alleged in a complaint, though not the legal conclusions it may contain, are deemed to be admitted. A motion to strike is properly granted if the

complaint alleges mere conclusions of law that are unsupported by the facts alleged.

Contracts Law > Remedies > Punitive Damages
Torts > Damages > Punitive Damages > Conduct Supporting Awards
[HN3] Punitive damages are not ordinarily recoverable for breach of contract. This is so because punitive or exemplary damages are assessed by way of punishment, and the motivating basis does not usually arise as a result of the ordinary private contract relationship. The few classes of cases in which such damages have been allowed contain elements which bring them within the field of tort.

Torts > Business Torts > Bad Faith Breach of Contract > Remedies
Torts > Damages > Costs & Attorney Fees > General Overview
Torts > Damages > Punitive Damages > Conduct Supporting Awards
[HN4] Breach of contract founded on tortious conduct may allow the award of punitive damages. Such tortious conduct must be alleged in terms of wanton and malicious injury, evil motive and violence, for punitive damages may be awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others. Thus, there must be an underlying tort or tortious conduct alleged and proved to allow punitive damages to be granted on a claim for breach of contract, express or implied. To furnish a basis for recovery of punitive damages, the pleadings must allege and the evidence must show wanton or wilful malicious misconduct, and the language contained in the pleadings must be sufficiently explicit to inform the court and opposing counsel that such damages are being sought. Attorney's fees may be awarded as a component of punitive damages.

Labor & Employment Law > Employment Relationships > Employment Contracts > Breach
Torts > Business Torts > Bad Faith Breach of Contract > Remedies
[HN5] Allegations that show a defendant was motivated to help itself; but that do not include facts that indicate that the defendant intended to harm the plaintiff, are not sufficient to support an award of punitive damages. At least where there is no allegation or proof that the termination of employment is violative of an important public policy, punitive damages cannot be recovered on a claim that a termination constituted a breach of the implied covenant of good faith and fair dealing contained in an employment contract.

JUDGES: [*1] Marshall K. Berger, J.

OPINION BY: Marshall K. Berger

OPINION

MEMORANDUM OF DECISION

On March 2, 2011, the plaintiff, Timothy M. Corbett, commenced this action against the defendants, the Hartford Financial Services Group, Inc. (The Hartford), and its subsidiary, Hartford Investment Management Company (HIMCO), alleging that they breached their employment agreement with him by arbitrarily reducing the value of his compensation, i.e, the "HIMCO Long-Term Incentive Plan," and the number of "units" to which he was entitled. On January 29, 2012, the court granted the plaintiff's motion to cite in the codefendant, Hartford Fire Insurance Company (Hartford Fire), which is another subsidiary of the Hartford.

In the plaintiff's substitute, amended complaint, filed on February 21, 2012, he alleges that the defendants breached the employment contract in count one; in count two, he asserts that the defendants breached the covenant of good faith and fair dealing by amending the incentive plan after he left the company thereby giving the defendants the ability to make a fee rebate adjustment that deprived the plaintiff of compensation that he was still due under the plan; and in count three, he alleges promissory estoppel [*2] asserting that he relied on the defendants as to the value of his units as part of his total compensation to his detriment. In his prayer for relief, the plaintiff seeks punitive damages and attorneys fees, among other things.

On February 15, 2012, the defendants moved to strike these two prayers for relief on the grounds that the plaintiff's allegations are legally insufficient to state a claim for such relief.[1] The plaintiff filed his memorandum in opposition on March 23, 2012 arguing that the allegations are legally sufficient to support claims for punitive damages and attorneys fees. On April 4, 2012, the defendants filed a memorandum in reply and this court heard oral argument on May 7, 2012.

1 The original complaint, filed March 2, 2011, contained a count alleging violation of the Connecticut Unfair Trade Practices Act, General Statutes §42-110 et seq. (CUTPA). The prayer for relief sought attorney's fees pursuant to *General Statutes §42-110d* and punitive damages pursuant to *General Statutes §42-110g*. The plaintiff also alleged "and otherwise" as to these two remedies.

> The defendants filed a motion to strike the CUTPA count and the associated prayers for relief on April 20, 2011 [*3] on the grounds that disputes arising out of an employment relationship do not state a claim under CUTPA. This court granted the motion on September 26, 2011.

[HN1] "The purpose of a motion to strike is to test the legal sufficiency of a pleading . . . The motion to strike contest[s] . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted . . . In addition, it may test the legal sufficiency of any prayer for relief in any such complaint, counterclaim or cross-complaint . . .

[HN2] "[A] motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted . . . For the purpose of ruling upon a motion to strike, the facts alleged in a complaint, though not the legal conclusions it may contain, are deemed to be admitted . . . A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Citations [*4] omitted; internal quotation marks omitted.) *Cadle Co. v. D'Addario, 131 Conn.App. 223, 230, 26 A.3d 682 (2011).*

[HN3] "Punitive damages are not ordinarily recoverable for breach of contract. Restatement, 1 Contracts §342; 5 Corbin, Contracts §1077; McCormick, Damages §81. This is so because, as lucidly reasoned by Professor Corbin in the passage cited, punitive or exemplary damages are assessed by way of punishment, and the motivating basis does not usually arise as a result of the ordinary private contract relationship. The few classes of cases in which such damages have been allowed *contain elements which bring them within the field of tort*." (Emphasis in original; internal quotation marks omitted.) *L.F. Pace & Sons, Inc. v. Travelers Indemnity Co., 9 Conn.App. 30, 47-48, 514 A.2d 766*, cert. denied, *201 Conn. 811, 516 A.2d 886 (1986).*

[HN4] "Breach of contract founded on tortious conduct may allow the award of punitive damages. Such tortious conduct must be alleged in terms of wanton and malicious injury, evil motive and violence, for punitive damages may be awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others [*5] . . . Thus, there must be an underlying tort or tortious conduct alleged and proved to allow punitive damages to be granted on a claim for breach of contract, express or implied." (Citations omitted; internal quotation marks omitted.) *Id., 48.* "To furnish a basis for recovery of [punitive] damages, the pleadings must allege and the evidence must show wanton or wilful malicious misconduct, and the language contained in the pleadings must be sufficiently explicit to inform the court and opposing counsel that such damages are being sought." *Markey v. Santangelo, 195 Conn. 76, 77, 485 A.2d 1305 (1985).* "[A]ttorney's fees may be awarded as a component of punitive damages." *O'Leary v. Industrial Park Corporation, 211 Conn. 648, 651, 560 A.2d 968 (1989).*

A review of the amended complaint fails to reveal any factual--as opposed to conclusory--allegations of wanton and malicious injury. The first forty-eight paragraphs are all couched in breach of contract language. For example, the plaintiff alleges in paragraph forty-seven: "After Mr. Corbett completed his obligations under the Plan and after Mr. Corbett completed his employment service, the Defendants, acting in concert, breached their contractual [*6] obligations under the Plan by arbitrarily reducing the value of Units to which Mr. Corbett was entitled." In paragraph forty-nine, the plaintiff alleges that the defendants surreptitiously modified the "Change of Control" provision. In paragraph fifty, Corbett alleges the actions were done "with the purpose and intent of depriving Mr. Corbett and others of the benefit of the Units becoming immediately due and payable at the value calculated under the Plan." Paragraphs fifty-one and fifty-two state that these actions breached the contract and that the plaintiff suffered damages as a result.

In connection with the breach of the covenant of good faith and fair dealing, the plaintiff alleges in paragraph fifty-seven that the defendants' conduct in revising the plan and depriving him of certain benefits was done "to subjugate Mr. Corbett's interests in service of their own financial objectives." The promissory estoppel count contains no allegations of wanton or wilful malicious misconduct.

In a similar case in which the defendant moved to strike prayers for punitive damages and attorneys fees based upon allegations of a breach of contract and a breach of the covenant of good faith and fair [*7] dealing, the court, Thim, J., ruled: "In this case, the plaintiff fails to allege specific facts to establish tortious conduct of such an outrageous nature as to sustain a demand for an award of punitive damages for breach of covenant of good faith and fair dealing. [HN5] Allegations such as those made by the plaintiff in this case, that show the defendant was motivated to help itself; but that do not include facts that indicate that the defendant intended to harm the plaintiff are not sufficient to support an award of punitive damages." *Enviro Express v. Bridgeport Resco Co., Superior Court, judicial district of Fairfield, Docket No. CV 00 0374626, 2001 Conn. Super. LEXIS*

2620 (September 6, 2001, Thim, J.); see also *Barry v. Posi-Seal International, Inc., 40 Conn.App. 577, 587-88, 672 A.2d 514* ("[c]onsequently, we hold that, at least where there is no allegation or proof that the termination of employment is violative of an important public policy, punitive damages cannot be recovered on a claim that a termination constituted a breach of the implied covenant of good faith and fair dealing contained in an employment contract"), cert. denied, *237 Conn. 917, 676 A.2d 1373 (1996)*.

Construing "the complaint in the manner [*8] most favorable to sustaining its legal sufficiency"; see *Bridgeport Harbour Place I, LLC v. Ganim, 303 Conn. 205, 213, 32 A.3d 296 (2011)*; this court is unable to find that the plaintiff has properly alleged any facts to support his claim for punitive damages or attorneys fees for this breach of contract matter. See *Markey v. Santangelo, supra, 195 Conn. 77*. Accordingly, the defendants' motion to strike is granted.

Berger, J.

Enviro Express, Inc. v. Bridgeport Resco., LP

CV000374626

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF FAIRFIELD, AT BRIDGEPORT

2001 Conn. Super. LEXIS 407

February 15, 2001, Decided
February 15, 2001, Filed

NOTICE: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

DISPOSITION: For the reasons hereinbefore expressed Resco's motion to strike Enviro's CUTPA claim is denied: Resco's motion to strike Enviro's prayer for common law punitive damages is granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff sued defendant for breach of contract, violation of the Connecticut Unfair Trade Practice Act (CUTPA), *Conn. Gen. Stat. § 42-110a et seq.*, and breach of the implied covenant of good faith and fair dealing. Defendant moved to strike the CUTPA claim and the prayer for common law punitive damages.

OVERVIEW: Plaintiff hauled waste for defendant pursuant to an agreement. Plaintiff alleged that defendant notified plaintiff of its intent to reduce the hauling fee that it paid to plaintiff, and that defendant subsequently "unilaterally" reduced the hauling fee. Plaintiff sought money damages, common law punitive damages for its breach of the implied covenant claim, and punitive damages and attorneys fees for its CUTPA claim. The court denied defendant's motion to strike plaintiff's CUTPA claim. Plaintiff alleged facts beyond a simple breach of contract that were sufficient to support a CUTPA violation. Plaintiff alleged that their agreement was entered into to resolve prior litigation, and that defendant's breach of the agreement indicated that it never intended to fulfill the agreement. The court, however, struck plaintiff's claim for common law punitive damages for breach of the implied covenant of good faith and fair dealing. The factual allegations were insufficient to support plaintiff's contention that defendant's conduct was willfully, recklessly, or maliciously tortious.

OUTCOME: Motion to strike the CUTPA claim was denied, as the allegations were sufficient to state a cause of action. Motion to strike prayer for common law punitive damages was granted, because the allegations were insufficient to support a finding that defendant's conduct was willfully, recklessly, or maliciously tortious.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Strike > General Overview

[HN1] In ruling on a motion to strike, the role of the trial court is to examine the complaint, construed in favor of the plaintiff, and to determine whether the plaintiff has

stated a legally sufficient cause of action. It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. A motion to strike is properly granted if the complaint alleges mere conclusions of law that are not supported by the facts alleged. In addition, a party may use a motion to strike to attack the legal sufficiency of a prayer for relief. Pursuant to Conn. Gen. Prac. Book, R. Super. Ct. *§ 10-39*, a court can strike a claim for relief only if the relief sought could not be legally awarded.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
Antitrust & Trade Law > Trade Practices & Unfair Competition > State Regulation > Coverage
Governments > Courts > Common Law
[HN2] In determining whether a practice violates the Connecticut Unfair Trade Practice Act, *Conn. Gen. Stat. § 42-110a et seq.*, the courts use the criteria set out by the federal trade commission in the "cigarette rule" for determining when a practice is unfair: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, competitors, or other business persons. All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.

Antitrust & Trade Law > Trade Practices & Unfair Competition > State Regulation > Coverage
Contracts Law > Breach > General Overview
International Trade Law > General Overview
[HN3] A simple breach of contract, even if intentional, does not amount to a violation of the Connecticut Unfair Trade Practice Act (CUTPA), *Conn. Gen. Stat. § 42-110a et seq.*; a claimant must show substantial aggravating circumstances to recover under CUTPA. However, the same set of facts that establish a breach of contract claim may be sufficient to establish a CUTPA violation. Thus, where the plaintiff alleges sufficient aggravating circumstances, beyond a mere breach that may bring the case within the cigarette rule, the CUTPA claim may withstand a motion to strike. On the other hand, a simple claim of breach of contract is not sufficient to give rise to a CUTPA violation, particularly where the complaint simply incorporates by reference the breach of contract claim and does not set forth how or in what respect the defendant's activities are either immoral, unethical, unscrupulous, or offensive to public policy.

Civil Procedure > Remedies > Damages > Punitive Damages
Contracts Law > Types of Contracts > Covenants
Torts > Damages > Punitive Damages > Conduct Supporting Awards
[HN4] Punitive damages awards are not ordinarily available in a contract action unless tortious conduct that is malicious, willful, or reckless is alleged.

JUDGES: Melville, J.

OPINION BY: Melville

OPINION

MEMORANDUM OF DECISION RE: MOTION TO STRIKE # 104

Before the court is the defendant's motion to strike the CUTPA claim and the prayer for common law punitive damages in the plaintiff's amended complaint. The plaintiff, Enviro Express, Inc. alleges the following facts in its amended complaint. The defendant, Bridgeport Resco Co., L.P., owns and operates a resource recovery facility in Bridgeport and disposes of solid waste. Enviro hauls waste for Resco to licensed disposal facilities designated by Resco. Enviro and Resco have been doing business with each other since 1988, and, over the course of their relationship, have entered into several agreements. On June 9, 1999, they entered into an agreement related to hauling fees. Enviro alleges that on March 7, 2000, Resco notified Eviro of its intent to [*2] reduce the hauling fee that it pays to Enviro, and that on or about May 9, 2000, Resco "unilaterally" reduced the hauling fee by $ 2.

In the three-count amended complaint, filed on August 21, 2000, Enviro asserts causes of action against Resco for breach of contract, violation of the Connecticut Unfair Trade Practice Act (CUTPA), *General Statutes § 42-110a, et seq*, and breach of the implied covenant of good faith and fair dealing. In its prayer for relief, Enviro seeks money damages, common law punitive damages for its breach of the implied covenant claim, and punitive damages and attorneys fees for its CUTPA claim.

On September 20, 2000, Resco filed a motion to strike Enviro's CUTPA claim and its prayer for common law punitive damages on the grounds that Enviro bases its CUTPA claim on legal conclusions that are not supported by factual allegations, improperly bases its

CUTPA claim on a breach of contract claim, and that common law punitive damages cannot be recovered for breach of an implied covenant of good faith and fair dealing. Resco filed a memorandum in support of its motion. Enviro filed an objection to the motion to strike and a memorandum [*3] in support thereof in which it asserts that its CUTPA claim is legally sufficient and that common law punitive damages can be recovered under Connecticut law.

[HN1] In ruling on a motion to strike, the role of the trial court is to examine the complaint, construed in favor of the plaintiff, and to determine whether the plaintiff has stated a legally sufficient cause of action. *Napoletano v. CIGNA Healthcare of Connecticut, Inc., 238 Conn. 216, 232-33, 680 A.2d 127 (1996)*, cert. denied, *520 U.S. 1103, 117 S. Ct. 1106, 137 L. Ed. 2d 308 (1997)*. It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. *Doe v. Yale University, 252 Conn. 641, 667, 748 A.2d 834 (2000)*. A motion to strike is properly granted if the complaint alleges mere conclusions of law that are not supported by the facts alleged. *Novametrix Medical Systems, Inc. v. BOC Group, Inc., 224 Conn. 210, 215, 618 A.2d 25 (1992)*. In addition, a party may use a motion to strike to attack the legal sufficiency [*4] of a prayer for relief. Pursuant to *Practice Book § 10-39*, a court can strike a claim for relief "only if the relief sought could not be legally awarded." *Pamela B. v. Ment, 244 Conn. 296, 325, 709 A.2d 1089 (1998)*.

In count one, Enviro asserts that Resco's conduct in unilaterally reducing the hauling fee violates the terms of the parties' June 9, 1999 agreement and constitutes a breach of contract. In count two, Enviro incorporates by reference the allegations made in count one and asserts that Resco's conduct constitutes an unfair and deceptive trade practice in violation of CUTPA.

It is well settled that [HN2] in determining whether a practice violates CUTPA the courts have adopted the criteria set out in the 'cigarette rule' by the federal trade commission for determining when a practice is unfair: (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [*5] (3) whether it causes substantial injury to consumers, competitors or other business persons. *Hartford Electric Supply Co. v. Allen-Bradley Co., Inc., 250 Conn. 334, 367-68 736 A.2d 824(1999)*. All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. *Id.*

A majority of the Superior Court cases support the claim that [HN3] a simple breach of contract, even if intentional, does not amount to a violation of CUTPA; a claimant must show substantial aggravating circumstances to recover under the Act. (Internal quotation marks omitted.) *Day v. Yale University, 2000 Conn. Super. LEXIS 658*, Superior Court,judicial district of New Haven at New Haven, Docket No. 400876 (March 7, 2000, Licari, J) (26 Conn. L. Rptr. 634, 639); see also *Giannetti v. Greater Bridgeport Individual Practice Assn., 1999 Conn. Super. LEXIS 1033*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. 355718 (April 22, 1999, Melville, J.). However, "the same set of facts that establish a breach of contract claim may be sufficient to establish a CUTPA violation . . ." (Citation [*6] omitted.) *Lester v. Resort Camplands International, Inc., 27 Conn. App. 59, 71, 605 A.2d 550 (1992)*. Thus, where the plaintiff alleges sufficient aggravating circumstances, beyond a mere breach that may bring the case within the cigarette rule, the CUTPA claim may withstand a motion to strike. *Benvenuti Oil Co. v. Foss Consultants, Inc., 1999 Conn. Super. LEXIS 923*, Superior Court, judicial district of New London at New London, Docket No. 542755 (April 6, 1999, Mihalakos, J.). On the other hand, a simple claim of breach of contract is not sufficient to give rise to a CUTPA violation, particularly where the complaint simply incorporates by reference the breach of contract claim and does not set forth how or in what respect the defendant's activities are either immoral, unethical, unscrupulous, or offensive to public policy. *Giannetti v. Greater Bridgeport Individual Practice Assn., 1999 Conn. Super. LEXIS 1033*, Superior Court, Docket No. 355718.

In this case, in count two, Enviro alleges facts beyond a simple breach of contract that are sufficient to support a CUTPA violation. Enviro contends that the parties entered into the June 9, 1999 agreement to resolve prior litigation between them and that Resco's [*7] breach of the agreement less than one year later indicates it never intended to fulfill the terms thereof and entered into the agreement solely to terminate the prior litigation. Enviro further asserts that in violating the June 1999 agreement, Resco acted with a tortious intent because it unilaterally reduced the hauling fee without negotiating a reduction and without giving consideration to Enviro's position. Such conduct, if proven, might well constitute an unscrupulous conduct and thus an aggravation of a simple matter of breach of contract. Accordingly defendant's motion to strike count two is hereby denied.

Resco also alleges that Enviro's prayer for common law punitive damages for its cause of action for breach of

the implied covenant of good faith and fair dealing should be stricken on the ground that Enviro cannot recover punitive damages because it fails to allege conduct by Resco that supports such a recovery. Resco, however, does not move to strike Enviro's cause of action for breach of the implied covenant. [HN4] Punitive damages awards are not ordinarily available in a contract action unless tortious conduct that is *malicious, wilful* or reckless is alleged. *City of Hartford v. International Assn. of Firefighters, Local 760, 49 Conn. App. 805, 817, 717 A.2d 258,* [*8] cert. denied, *247 Conn. 920, 722 A.2d 809 (1998).* In count three, Enviro incorporates the allegations it made in count one, and asserts that Resco acted with wilful or reckless disregard of Enviro's rights. The factual allegations contained in counts one and three are, however, insufficient to support Resco's contention that Enviro's conduct was wilfully, recklessly, or maliciously tortious. Therefore, Resco's motion to strike Enviro's prayer for common law punitive damages is hereby granted.

For the reasons hereinbefore expressed Resco's motion to strike Enviro's CUTPA claim is denied: Resco's motion to strike Enviro's prayer for common law punitive damages is granted.

Melville, J.

2011 WL 2536480
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford–Norwalk.

Robert B. JOHNSON, Trustee et al.
v.
GIBBS WIRE & STEEL CO., INC.

No. X05CV095013295S.
|
May 31, 2011.

BLAWIE, J.

Introduction

***1** The plaintiff group of minority shareholders have brought this action seeking judicial dissolution of a closely held corporation under General Statutes § 33–896 et seq. [1] The plaintiff's claim that the current management of Gibbs Wire & Steel Company, Inc. (the Company) has acted in a manner that is oppressive to its shareholders. The plaintiffs seek a pro rata distribution of their respective interest (approximately 40%) in the Company upon dissolution. In a previous memorandum of decision (# 132), the court denied the defendant's motion to dismiss for lack of subject matter jurisdiction. Having failed to persuade the court of the strength of its prior jurisdictional arguments, comes now the defendant Company with a motion to strike the plaintiffs' complaint on the grounds that it fails to state a claim for oppression of the minority shareholders. The motion to strike is also denied for the reasons set forth herein.

Motion to Strike—Legal Standard

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "It is fundamental that in determining the sufficiency of a [pleading] challenged by a [party's] motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *Gazo v. Stamford*, 255 Conn. 245, 260, 765 A.2d 505 (2001). "A motion to strike ... does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings." (Internal quotation marks omitted.) *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 588, 693 A.2d 293 (1997). The court "construe[s] the complaint in the manner most favorable to sustaining its legal sufficiency ... [I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Sullivan v. Lake Compounce Theme Park, Inc.*, 277 Conn. 113, 117–18, 889 A.2d 810 (2006). "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves, supra*, 262 Conn. at 498. Further, our Supreme Court "will not uphold the granting of [a] motion to strike on a ground not alleged in the motion." *Blancato v. Feldspar Corp.*, 203 Conn. 34, 44, 522 A.2d 1235 (1987).

On a motion to strike, the court confines itself to the four corners of the complaint, and will not consider documents or countervailing proof that lies outside of the complaint. "In ruling on a motion to strike, the court is limited to the facts alleged in the complaint." (Internal quotation marks omitted.) *Faulkner v. United Technologies Corp., supra*, 240 Conn. at 580. "A motion to strike challenges the legal sufficiency of a pleading ... and, consequently, requires no factual findings by the trial court." (Internal quotation marks omitted.) *Batte–Holmgren v. Commissioner of Public Health*, 281 Conn. 277, 294, 914 A.2d 996 (2007). "Where the legal grounds for such a motion [to strike] are dependent upon underlying facts not alleged in the plaintiff's pleadings, the defendant must await the evidence which may be adduced at trial, and the motion should be denied." (Internal quotation marks omitted.) *Commissioner of Labor v. C.J.M. Services, Inc.*, 268 Conn. 283, 293, 842 A.2d 1124 (2004).

***2** This court takes "the facts to be those alleged in the complaint ... and ... construe[s] the complaint in the manner most favorable to sustaining its legal sufficiency ... Thus [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied ... Moreover, [the court notes] that [w]hat is necessarily implied [in an allegation] need not be expressly alleged ... It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike,

all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted ... Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell,* 295 Conn. 240, 252–53, 990 A.2d 206 (2010).

This case is only at the pleading stage. If this complaint adequately pleads a cause of action for corporate dissolution as a result of oppressive conduct, or that any corporate assets are being misapplied, the motion to strike must be denied. "It is of no moment that the defendants might prove facts which operate to bar the plaintiff's claim, the sole inquiry at this stage of the pleadings is whether the plaintiff's allegations, if proved, would state a basis for standing ... [An] argument [that] would require the court to consider facts outside the face of the pleadings ... would be improper on a motion to strike ..." (Citations omitted.) *Miller v. Insilco Corp.*, Superior Court, judicial district of New Haven, Docket No. 279267 (May 22, 1990, Schimelman, J.) (1 Conn. L. Rptr. 651); *Edward J. Smith Co. v. Palmieri,* Superior Court, judicial district of Ansonia–Milford, Docket No. CV 07 5003216 (March 14, 2008, Moran, J.) (denying motion to strike because contract was not attached as an exhibit to the original complaint, thereby making the grounds for the motion to strike dependent on facts not in the complaint); *R.I. Pools, Inc. v. Lillien,* Superior Court, judicial district of Stamford–Norwalk at Stamford, Docket No. CV 04 4000871 (February 8, 2005, Wilson, J.) (concluding that the defendants' introduction of evidence that was not part of the complaint made the motion to strike a "speaking motion" and stated that the defendant was trying to accomplish through a motion to strike what is more appropriately accomplished through a motion for summary judgment).

As previously stated therefore, for purposes of a motion to strike, the court must restrict itself to the allegations contained in the complaint, and must accept those allegations as true. [2]

Discussion

The Company is a closely held Connecticut corporation with a principal place of business in Southington, Connecticut. It was formed in 1956 as the result of a partnership primarily between two businessmen, Charles Gibbs and Robert Johnson, both of whom are now deceased. The Company has grown over the years into a worldwide leader in the metal working industry, specifically the supply and processing of wire and strip. The Company also maintains a network of metal service centers for its customers at locations throughout the United States and Canada. The Company's market share is such that it claims to be the primary source for wire and strip in North America. There is no public market for its stock, however, and this lawsuit would likely never have been filed if there was.

***3** The Company's growth for many years was lead by its founding families, the Gibbs and the Johnsons. These are essentially the forces now arrayed on either side of this litigation. The Gibbs family and its allies are currently entrenched in the senior management of the defendant Company that bears its name, as well as being the majority shareholders. The plaintiff Johnson family is now reduced to the status of minority shareholders with no active role in running the business and without a seat on the Company's board. The Johnson family's primary contact with the Company these days (other than through their lawyers) is probably their periodic dividend checks.

When the Company was established in the 1950s, it was consistent with the founder's intent to structure the corporate ownership in a manner more akin to a closed partnership. [3] The Company's original bylaws included a provision for share repurchases that required each shareholder who wanted to sell his shares to first offer the shares to the Company's other shareholders. If the fellow shareholders declined to buy the offered shares, the shareholder was then required to offer the shares to the Company. Only after those two conditions precedent were satisfied could a Company shareholder offer to sell its shares to a third party.

No doubt fearing that one of its competitors might acquire an equity stake in the Company by such a process, a corporate competitor whose interests would not be aligned with the best interests of the Company's other shareholders, the founders made a change in the corporate bylaws to enshrine the Company's right of first refusal. The bylaws were amended in 1960 to state that any shareholder wishing to sell his shares must first offer to sell them back to the Company. If the Company was not interested in buying the offered shares and declined purchase, the shareholder next had to offer their shares for sale to the other existing shareholders. It was only once these two offers to sell were declined that a shareholder could offer shares in the Company to a third party. This bylaw provision remains in effect today.

The Company is an example of what may happen when a generation of management by a pair of founding fathers passes from the scene, and a new generation takes its place in a prosperous but closely held corporation. The trusting and harmonious relationship that once existed between founding families in another era is not always as easily maintained or as easily inherited as the Company stock certificates passed down to the founders' heirs in subsequent generations. The Gibbs family owns and has always owned a majority of the Company's voting stock. As a result, the Gibbs family is in effective control of this private closely held corporation. C. Wayne Gibbs is the current Chairman of the Board of Directors, the former Chief Executive Officer and the Company's majority shareholder. The plaintiffs are the family heirs of founder Robert Johnson, and collectively own about 40% of the Company. The Johnson family has never owned a majority of the Company's voting stock, and other than its ownership of certain shares of non-voting stock, it currently has no control over the Company. The last family member to serve as an officer was the plaintiff Bob Johnson, the son of founder Robert Johnson. Bob Johnson retired in 1995 after a long career with the Company, and he was removed from the board of directors in 2005. No Johnson family members currently serve as corporate officers or hold any seats on the Company's board of directors.

***4** The founder Robert Johnson, the plaintiff shareholders' predecessor in interest, made his original investment in the Company over 50 years ago, during the Eisenhower administration. Robert Johnson provided the majority of the initial funding for the Company. He also provided the know how and customer contacts to get the fledgling business off the ground, and recruited Charles Gibbs to join the new venture that now bears his name. Without Robert Johnson's substantial financial assistance and business acumen, the Company would never have been established. Robert Johnson died in 1970, and much of the Johnson family's collective wealth has not been diversified since then. It remains tied up in Company stock, for which there is no public market.

Although a majority of the plaintiffs' allegations of oppressive conduct by the Company focus on the events pertaining to the valuation and repurchase of the plaintiffs' shares, the complaint also alleges oppression in the form of slashed dividend payments to the plaintiffs. The issue of share repurchases will be discussed first.

Valuations & Share Repurchases

The plaintiffs claim that, historically, the Company had regularly repurchased shares from its shareholders at book value, without applying discounts for marketability or minority interest. That situation changed following the death of founder Charles Gibbs in 2004. Charles Gibbs had previously served as both the Company's chief executive officer and chairman of the board of directors. However, after his death, the Company unfairly altered its method of repurchasing its shares to allow it to do so at a depressed price and to the detriment of the plaintiff shareholders. A valuation of the Company was performed for the estate of Charles Gibbs by a company called Empire Valuation. Empire applied multiple discounts, ultimately valuing the Company's stock far below book value at a per share price of $32.60.

The dissatisfied plaintiff shareholders questioned the accuracy and validity of the Empire valuation, and the Company suggested that the Johnsons undertake an independent valuation. In 2005, the plaintiffs hired a firm called Ireland Associates, LLC, to rebut the Empire valuation with another appraisal of the Company. The Ireland valuation on behalf of the dissident shareholders set a share price of $75.92. This was more than double the per share price proposed by Empire, working on behalf of the Company. The Company and its largest minority shareholder group were obviously far apart. But all valuations are based on opinions, and such opinions are only as good as the assumptions on which they are based, which may also involve a consideration of the reasons why the valuation was done in the first place. Perhaps the former is too low, calculated primarily with the single goal of lowering the bite of federal estate taxes for the Gibbs family. Perhaps the latter is too high, designed solely to favor a valuation the plaintiff Johnson family most desire, with only a single goal of share repurchase in mind, and not the operational needs of the Company itself. The ultimate determination will have to await the evidence, as this case is only at the pleading stage.

***5** In December 2006, the Company announced a repurchase of a minimum number of shares on a pro rate basis in early 2007, at a price much closer to the Empire valuation rather than the Ireland valuation. This meant that the Company set the repurchase price significantly below its book value at the time, and marked the first implementation of the new method of share repurchasing. It replaced the Company's heretofore standard method of repurchasing shares at book

value. The Company's explanation for the lower price was that it was attempting to be fair to all of its shareholders, both those who wanted to sell shares back to the Company and those who wanted to remain as shareholders. The Company further argues that no matter how badly a shareholder wants out, a closely held corporation has no obligation to use its resources to buy back shares.

As minority shareholders, the Johnson family could not challenge the Company's move away from repurchasing shares at book value to a much lower valuation price. This left the minority plaintiffs in the position of either selling their stock back to the Company at a deeply discounted price, or remaining shareholders in the face of steadily diminishing dividend payments. Because their valuation of the Company established a much higher value for their substantial holdings, the Johnson family elected not to participate in the share repurchase on the Company's terms. The plaintiffs shared the Ireland valuation report with Company management. Aware of the circulation of the Ireland valuation figures among other shareholders and interested parties, it seems reasonable to infer that the defendant felt compelled to respond, lest the value stated therein gain some currency. The Company sent a letter to all shareholders:

> On January 18, 2007, an attorney representing members of a family with a large minority interest in the Company forwarded us a valuation they had done of the company. This valuation alleges a much higher enterprise value for the shares than what we have from Empire Valuation. We have reviewed this alternate valuation. We sent it to Empire for review. In our view and in the view of Empire, this alternative view, this alternative valuation is without merit. It does not value the proper time period. It includes faulty assumptions. It uses very questionable data. It was done without any input from the Company. For these reasons, we do not believe they have presented an accurate valuation of the Company for purposes of the current stock buybacks.

The plaintiffs contend that this letter misled shareholders, as the Company failed to disclose what specific data utilized was "questionable", and that the data in the valuation included five years of the Company's own financial statements.

Dividend Cuts

Claiming to be shut out of the corridors of Company power in the 21st century, the plaintiffs are in no position to influence management or its policies. However, the Johnsons do enjoy a cash dividend each year. This dividend is paid by the Company on the non-voting shares, generally amounting to several hundred thousand dollars annually to the Johnson family. But this is another corporate development that over the years has supposedly worked to the detriment of the plaintiffs. At the same time it was instituting a much lower share price for repurchases, the Company was also slashing its dividend. A dividend is a distribution of a portion of a company's earnings, decided by the board of directors, to a class of its shareholders. The dividend is most often quoted in terms of the dollar amount each share receives (dividends per share).

***6** In December 2003, the Company changed its long-term historical policy of paying a dividend of $2 per share annually. Effective January 1, 2004, the Company cut its dividend rate to $1.50 per share. The Company stated that this was expected to be a short-term management adjustment, and hoped that the dividend would return to its prior levels as the economy improved. Further, in a December 2003 letter to shareholders, the Company stated that the reason for the change was that it wanted dividends to stay in the range of fifty percent of earnings per share. However, this reasoning was not followed when the Company's earnings per share "exploded upward" from 2004 through 2007.[4] In December 2008, the Company announced a further cut in the dividend rate to $1.25 per share.

As the Johnson family was shut out[5] of the lucrative employment opportunities afforded to the Gibbs family, these dividend payments represented the only return on investment that the plaintiffs obtain from the Company. The plaintiffs contend that management lowered its dividend in an attempt to "squeeze" the minority plaintiff shareholders out of the Company altogether, by pressuring them to sell their non-voting shares back to the defendant Company at a price substantially below the true fair market value. In sum, the plaintiffs claim that the Company's unwillingness

to repurchase shares in accordance with its prior practice, and its move to a much lower share price could only be justified if the Company was distributing financial benefits to its shareholders in other ways, such as through increased dividends. However, this was not so, and as a result of these changes, shareholders like the plaintiffs are faced with the "lose/lose" situation as described above. The Johnson family shareholders claim to be "at the mercy of Wayne Gibbs and the Company's management." The Company argues that the plaintiffs were treated like every other shareholder, and that the dividends paid to the Johnsons were no different than the dividends paid to every other shareholder, including Wayne Gibbs. However, Wayne Gibbs now controls approximately 93% of the Company's voting stock, and dividends are only a portion of the economic benefit he enjoys from the Company. The powers granted to a man in such a position of authority "are necessarily and at all times exercisable only for the ratable benefit of *all* the shareholders as their interest appears." (Emphasis added.) A. Berle, Jr., "Corporate Powers as Powers in Trust," 44 Harv.L.Rev. 1049, 1049 (1931).

The bylaw provision which grants the Company the right of first refusal to repurchase its shares was also the subject of prior litigation between the Company and its dissident shareholder group. In 2007, the plaintiffs, with the exception of a trustee of a Johnson family trust, collectively offered the Company all of their voting and non-voting stock, as required by the bylaws. The Company accepted the plaintiffs' offer to sell their voting stock, but declined to purchase the non-voting stock. Litigation followed over the terms of the transaction. In *Gibbs Wire & Steel Co., Inc. v. Johnson,* 255 F.R.D. 326 (D.Conn.2009), the Company brought an action as a plaintiff in Superior Court against these same plaintiffs for breach of contract for failing to sell their stock to the Company pursuant to the bylaws. Citing diversity of citizenship, the defendants (the current plaintiffs in the instant case) removed the case to the United States District Court in Connecticut, and asserted a counterclaim that the bylaw provision mandating a right of first refusal constituted an unreasonable restraint on alienation. Judgment was entered in favor of the Company in federal court in 2009.

***7** As a result of the federal lawsuit, the Company acquired title to the Johnson's voting shares through a purchase of all shares of the plaintiffs' voting stock. Left unpurchased by the Company and unsold by these plaintiffs were the remaining non-voting Company shares, hence this litigation. All other things being equal, voting shares have intrinsically greater value than non-voting stock, due to the voting rights attached to ownership of such shares and the corresponding opportunity to effect and/or direct changes in the Company. Now shorn of their voting stock as a result of the prior litigation between the parties, the reduced dividend payments represent the only economic benefit that nonvoting shareholders like the Johnsons realize from their investment. The plaintiffs contend that this created a "lose/lose" situation for non-voting shareholders, who are faced with one of two unpalatable choices. They could either sell their shares back to the Company at a discounted price substantially below book value, or remain on as shareholders in the face of steadily diminishing dividend payments and with no voice in the allocation of the Company's substantial profits.

In the aggregate, the plaintiffs own directly or beneficially over 250,000 shares of the Company's non-voting stock. This represents a sizable minority shareholder interest of approximately forty percent (40%) of the total issued and outstanding stock of this closely held corporation. It seems safe to say that the total value of all shares held by the Johnson family is in the millions of dollars,[6] but not surprisingly, these two parties who disagree over so many other issues also disagree on the proper share valuation. The parties cannot agree on accounting principles that would employ valid criteria for making valuations on a per share basis. This case is not only a battle over the terms and conditions of any share repurchase plan. A set price per non-voting share and the declaration of dividends and how both are calculated are further disputed questions of fact. It is clear that if this dissolution proceeding is found to have merit when all the discovery has been completed, and if the plaintiff's case survives summary judgment, the balance sheets, if not the Company itself, could hang in the balance.

In its earlier motion to dismiss, the defendant argued that because the plaintiffs have not completed the process of offering their shares as prescribed by the bylaws, the plaintiffs have not exhausted the remedies available to them. The Company contended that this failure deprived this court of subject matter jurisdiction. The court was not persuaded, and as it stated in its earlier memorandum of decision denying the motion to dismiss, at its core the plaintiffs' complaint seeks relief from oppressive conduct by the Company's majority shareholders. That alone is enough to survive the motion to strike. The defendant argues that the complaint is devoid of any allegations that might support a finding of oppression by Company management. The court disagrees, finding that the facts as pleaded sufficiently set forth such a claim. It would indeed to be incongruous for this court to have previously

denied the defendant's motion to dismiss on the basis that the complaint properly seeks relief from allegedly oppressive conduct, but to now grant the defendant's motion to strike for the opposite reason. While the defendant Company may raise valid arguments in its opposition to this motion, those arguments rely on facts, or the finding of facts, that lie outside of the complaint.

***8** A fiduciary relationship is "characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." *Dunham v. Dunham,* 204 Conn. 303, 322, 528 A.2d 1123 (1987), overruled on other grounds by *Santopietro v. New Haven,* 239 Conn. 207, 682 A.2d 106 (1996). Many relationships implicate fiduciary duties, including corporate directors. *Konover Development Corp. v. Zeller,* 228 Conn. 206, 222, 635 A.2d 798, 806 (1994). Because these associations are imbued with the utmost trust, the parties are bound to "act honestly, and with the finest and undivided loyalty ... not merely with that standard of honor required of men dealing at arm's length and the workaday world, but with a punctilio of honor the most sensitive." (Internal quotation marks omitted.) *Id.,* at 220. Shareholders in a close corporation owe each other a fiduciary duty. *Flight Services Group, Inc. v. Patten Corp.,* 963 F.Sup. 158, 160 (D.Conn.1997).

It is clear that in enacting § 33–896, the legislature sought to protect shareholders of closely held corporations. "As the stock of closely held corporations generally is not readily salable, a minority shareholder at odds with management policies may be without either a voice in protecting his or her interests or any reasonable means of withdrawing his or her investment. This predicament may fairly be considered the legislative concern underlying the provision at issue in this case; inclusion of the criteria that the corporation's stock not be traded on securities markets and that the complaining shareholder be subject to oppressive actions supports this conclusion." *Morrow v. Prestonwold, Inc.,* Superior Court, judicial district of New Haven, Docket No. CV 00 0445844 (March 22, 2002, Berdon, J.T.R.) (31 Conn. L. Rptr. 668, 670).

In analyzing whether dissolution is warranted, Connecticut courts examine whether the allegedly oppressive conduct of the majority shareholder has defeated the reasonable expectations of the minority shareholders. *Id.* Dissolution is an equitable remedy that is not to be ordered lightly. "Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. Disappointment alone should not necessarily be equated with oppression. Rather, oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture." *Id.* The reasonable expectations test was employed in the case of *Kanner v. Go Vertical, Inc.,* Superior Court, complex litigation docket at Stamford, Docket No. X05 CV 03 0196236 (September 15, 2005, Rogers, J.). The trial court found that a dissolution was not warranted, as the defendant corporate directors' actions did not violate the plaintiffs' rights as shareholders, and did not constitute illegal, oppressive or fraudulent conduct pursuant to § 33–896. This was because the plaintiff shareholders in that case did not have a reasonable expectation of continuing to manage the corporate facility, which was a profitable indoor climbing gym.

***9** "Oppression in the context of a dissolution suit suggests a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members, or a visible departure from the standards of fair dealing and a violation of fair play as to which every shareholder who entrusts his money to a company is entitled to rely." *Devivo v. Devivo,* Superior Court, judicial district of Hartford, Docket No. CV 980581020 (May 8, 2001, Satter, J.T.R.) (30 Conn. L. Rptr. 52, 53–54). The concept of oppressive conduct in a closely held corporation is separate and distinct from illegal conduct by management. Oppressive conduct "is not synonymous with the statutory terms 'illegal' or 'fraudulent.' The term can contemplate a continuous course of conduct and includes a lack of probity in corporate affairs to the prejudice of some of its shareholders." *Stone v. R.E.A.L. Health, P.C.,* Superior Court, judicial district of New Haven, Docket No. CV 98414972 (November 15, 2000, Munro, J.) (29 Conn. L. Rptr. 219, 225).

In an older case involving a predecessor statute granting the court the power to order a corporate dissolution, the Connecticut Supreme Court noted that the corporate form of organization was "enacted for the benefit of stockholders." *Krall v. Krall,* 141 Conn. 325, 334, 106 A.2d 165 (1954). The court in *Krall* found that the plaintiff minority shareholder had been deprived of any voice in the management of the business or any return from its profitable operation in the form of salary or regular dividends. *Id.* Granted, the allegations in this case do not approach the degree of corporate dysfunction in *Krall,* but in cases brought pursuant to § 33–896, the court

must carefully analyze the actions taken by the controlling stockholders. In another dissolution case decided at the time of the Second World War, *Olechny v. Thadeus Kosciuszko Society*, 128 Conn. 534, 24 A.2d 249 (1942), the Supreme Court noted that such an order would depend on whether a corporation's business could continue to be carried on "with equal justice to all of its stockholders." (Internal quotation marks omitted.) *Id.*, at 540.

It is axiomatic that the Company shareholders owe each other a duty to deal fairly, honestly and openly. Therefore, the question of what is "oppressive" conduct is closely related to that duty. Perhaps the controlling group can demonstrate a legitimate business purpose for its actions. In making this inquiry, the court acknowledges the fact that the controlling group must have some room to maneuver in establishing the business policy of the Company. This includes discretion in valuing and repurchasing shares and declaring dividends, including the amount of any such dividend. However, when the majority advances an asserted business purpose for their actions, it is open to the plaintiffs to attempt to demonstrate that the same legitimate objectives could have been achieved through an alternative course of action less harmful to the minority shareholder's interest. Therefore, in a dissolution action, the court must weigh the legitimate business purposes, if any, and determine whether oppression is established such that dissolution is warranted.

***10** Viewing the allegations in a light most favorable to the plaintiff, as the court must, as well as the reasonable inferences to be drawn therefrom, it may well be that the plaintiffs will be able to demonstrate that a design to pressure them to sell their shares at a price below their true value was at the heart of the Company's plan. It may also well be that the Company's board and management acted entirely properly and fully within their rights with respect to both share valuations, repurchases and the declaration of dividends. It seems plausible that if founders Robert Johnson and/or Edward Gibbs were alive today, this controversy would have never arisen in the first place. It seems equally plausible to note that if these two men could see what has happened since their passing, each would be vocal in their disapproval of some aspect of the conduct of both families. For purposes of this motion to strike, the court is satisfied that the complaint is sufficiently pleaded, and the motion to strike is without merit. Evidentiary determinations will have to await the evidence.

The object of the complaint is to furnish the defendant with such a description of the allegations against it that will enable it to make its defense, and to inform the court of the facts alleged, so that it may decide whether the particular cause of action is sufficiently pleaded. The defendant by way of this motion to strike asks for too much. Therefore, the merits of the plaintiffs' complaint and an assessment of the strength of their case must await the completion of discovery. It is premature to hold otherwise. To the concept of management oppression of this 40% owner of a closely held corporation, a 40% owner with no voice in management, the defendant Company interposes numerous objections. But having chosen a motion to strike as the vehicle with which to attack the validity of the allegations, the defendant must abide by the limited parameters of such a motion. It is elementary, but bears repeating, that the court's ability to decide the merits of this motion at the pleading stage is *not* the same as when the court rules on the pleadings on a later, more dispositive motion. That includes such matters as summary judgment, because the criteria for judging are different here. It has to do with certain presumptions the court must adhere to in favor of the non-moving party in its ruling. It is not that the allegations are necessarily true. It is first and foremost that all of the allegations that the plaintiffs are making must be taken as true for purposes of this—or any other—motion to strike.

It is apparent that this new round of litigation in Superior Court was invited—if not made downright inevitable—when the nonvoting shares held by the plaintiffs were left out of the resolution of the last legal battle between these two sides. That federal case did not settle all pending business disputes between the two parties. However, if a decree of dissolution is entered here pursuant to § 33–899,[7] this state case most assuredly will do so. Perhaps this lawsuit is simply a cry for greater transparency and liquidity in a closed corporation, a squabble over an old and illiquid investment that is nonetheless substantial, but no longer meets the investment objectives of the current minority shareholders, the heirs of the original investor and Company founder. Clearly this alleged oppression case turns on a consideration of the business judgment rule, and the legitimacy of management's decisions surrounding such issues as the repurchase of non-voting shares, the declaration of dividends, and the application of forensically sound share valuation procedures. In the final analysis, it turns on whether the minority shareholders were in fact oppressed within the meaning of the statute.

***11** Based on the foregoing, the court concludes that the allegations plead a viable cause of action for dissolution

pursuant to § 33–896.[8] The defendant's motion to strike is therefore denied.

IT IS SO ORDERED.

All Citations

Not Reported in A.3d, 2011 WL 2536480

Footnotes

1 Section 33–896 provides in relevant part: "The superior court for the judicial district where the corporation's principal office ... is located may dissolve a corporation: (1) In a proceeding by a shareholder if it is established that: (A) The directors or those in control of the corporation have acted, are acting or will act in a manner that is illegal, oppressive or fraudulent; or (B) the corporate assets are being misapplied or wasted." The statute was amended effective October 1, 2009, after the commencement of this action. See Public Acts 2009, No. 09–55.

2 Recognition of this principle of law in discussing a motion to strike avoids the repeated characterization of the allegations as allegations in this memorandum of decision.

3 The defendants argue that the intent of the original incorporators is not relevant to the issues now before this court. However, this is simply a motion to strike, and that argument may be pursued at a later stage.

4 The Company purportedly generated approximately $100 million in annual sales in 2007 and 2008, and gross profits in each of those two years in the neighborhood of $15 million.

5 The defendant argues that there is no allegation that a Johnson family member was refused employment, which may be a valid point to consider later on, but not on a motion to strike.

6 One valuation conducted in August 2008 pegged the Company shares held by the Johnson family at over $17 million, using a method purportedly based on net book value per share.

7 General Statutes § 33–899(a) states: "If after a hearing the court determines that one or more grounds for judicial dissolution described in section 33–896 exist, it may enter a decree dissolving the corporation and specifying the effective date of the dissolution, and the clerk of the court shall deliver a certified copy of the decree to the Secretary of the State, who shall file it."

8 The parties once raised the prospect of settlement last year at an earlier oral argument. In its decision on the motion to dismiss, the court reminded the parties of the following cogent observation. It does so again, as it bears repeating. If the plaintiffs prevail, the court does not assume that a decree of dissolution pursuant to § 33–896 et seq. will necessarily result in the actual liquidation of the Company. For example, § 33–900(a) provides that in lieu of dissolution, the Company "may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares."

> This is because "[t]he entry of a decree results in the termination of the business only if both the majority and the minority shareholders desire that result. Each faction has the ability at any stage of the proceedings to ensure the continued existence of the firm by buying out, or selling out to, the other faction. The business will cease only if continuing it is not in the interest of any of its shareholders.
>
> The point becomes clearer if one focuses on the motives for bringing a dissolution proceeding. Except for the rare case where the petition is prompted by pique, a shareholder suing for dissolution is trying to accomplish one of three things: (1) to withdraw his investment from the firm; (2) to induce the other shareholders to sell out to him; or (3) to use the threat of dissolution to induce the other shareholders to agree to a change in the balance of power or in the policies of the firm. All of these objectives can be accomplished without dissolution. If the petitioner wants to sell out, he is interested in receiving the highest possible price and is indifferent whether the purchase funds are raised by the other shareholders individually or by a sale of the firm's assets. If the second or third objectives motivate the suit, it is plain that the petitioner does not want dissolution at all. In all three situations, a dissolution petition is a means to another end. Since the petitioner can always achieve his purposes without dissolution, and since the defendant will always oppose it, the dispute is very likely to be settled without liquidating the firm's assets and terminating its business. The court's decision to grant or deny dissolution is significant only as it affects the relative bargaining strength of the parties; negotiations will go forward in any event. J.A.C. Hetherington & M. Dooley, "Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem," 63 VA.L.REV. 1, 27 (1977).

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Superior Court of Connecticut,
Judicial District of Stamford–Norwalk.

Cynthia KASPER
v.
John V. VALLUZZO et al.

No. FSTCV075004383S.
|
Dec. 23, 2011.

Opinion

KEVIN TIERNEY, Judge Trial Referee.

***1** At first blush this civil lawsuit appears to be a continuation of a Florida marriage dissolution action between the individual parties that went to judgment on January 30, 2009.

Actually in this civil complaint the plaintiff is seeking money damages for distributions from an LLC and other relief relating to Valluzzo Realty Associates, LLC, a Connecticut LLC. This case, and its companion case involving a Connecticut real estate partnership, was tried to the court over twenty-seven days. The plaintiff's operative complaint is the original four-count complaint dated June 7, 2007. The first count is breach of fiduciary duty against the defendant, John V. Valluzzo, as manager of Valluzzo Realty Associates, LLC. The second count seeks an accounting. The third count is breach of the LLC's Operating Agreement. The final count is breach of the statutory duty under Gen.Stat. § 34–141 against John V. Valluzzo in that he failed to discharge his duties as member and manager in good faith. The plaintiff seeks injunctive relief, monetary damages, an accounting, access to the LLC's books and records and other relief. The two defendants, both represented by the same counsel, filed an Amended Answer and Special Defenses dated February 18, 2010 (# 143.00). Both defendants have asserted six Special Defenses; (1) The individual parties as husband and wife are involved in a dissolution of marriage action in Palm Beach County, Florida and "If it is found, in the Florida matrimonial proceeding, that the Plaintiff has no viable legal interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC, then she has no standing to make the claims contained in the Complaint"; (2) Because the Florida dissolution of marriage proceedings are still pending, "It is impossible to determine damages, if any, to the Plaintiff, as long as her ownership interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC, is under dispute"; (3) The First Count breach of fiduciary duty, the Second Count accounting and the Fourth Count breach of statutory duty are barred by the statute of limitations, Gen.Stat. § 52–577; (4) "As to the Plaintiff's Third Count, there is no valid contract between the parties due to the lack of consideration"; (5) "If the acts as alleged in Plaintiff's complaint did occur the Plaintiff ratified those acts"; and (6) "The Plaintiff fails to state a cause of action upon which injunctive relief may be granted." The plaintiff filed in effect a general denial as to each of these six Special Defenses. In addition the defendants claim that the plaintiff has no standing to make individual claims against the LLC and such claim, if viable, must only be raised in a derivative action. The defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction dated August 21, 2010 (# 253.00) was heard during the trial and has been decided in a separate Memorandum of Decision of even date herewith. The issue of standing will be discussed in a later portion of this Memorandum of Decision.

***2** The court finds the following facts and legal conclusions.

The plaintiff, Cynthia Kasper, and the defendant, John V. Valluzzo, were married on November 4, 1993 in Westport, Connecticut. There are no children issue of the marriage. The defendant, John V. Valluzzo, has three children by a prior marriage, all of whom are adults: David Valluzzo, Carla Hurtado and Joan Mazzella. None of these three children are parties in either this instant lawsuit or the companion lawsuit, *Cynthia Kasper v. G & J Partnership and John V. Valluzzo*, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket Number FST CV 07–5004956 S. Both lawsuits were consolidated for trial and the evidence at trial will be considered in both lawsuits (# 220.86).

At issue in both lawsuits are three parcels of Connecticut real property. All three were formerly owned by George P. Valluzzo, the father of John V. Valluzzo. George P. Valluzzo owned and operated a precision metal parts business. In 1943 that business was located at North Street, Danbury, Connecticut and then at Taylor Street, Danbury, Connecticut. In the early 1950s the business was moved to 1 Sugar Hollow Road Danbury, Connecticut a property now owned by G & J Partners that is the subject of the companion lawsuit.

Later George P. Valluzzo purchased two separate adjacent parcels at 125 Park Avenue and 127 Park Avenue, Danbury, Connecticut in order to house a division of his precision metal parts business. He built a manufacturing building at 125 Park Avenue. In 1988 the business moved to Bethel, Connecticut and vacated both Danbury locations. George P. Valluzzo died on November 14, 2002. The precision metal parts business is no longer in existence.

The manufacturing building located at 1 Sugar Hollow Road, Danbury was torn down and a new building was constructed meeting the specifications of the then and current tenant, Pier 1 Imports, (U.S.) Inc. Ex. 9, Ex. 11, Ex. 12. The new retail building is 10,000 square feet on a 1.198–acre parcel of land adjacent to the Danbury Fair Mall. Ex. 64. 1 Sugar Hollow Road, Danbury is currently owned by G & J Partners. Ex. 75, Ex. 83. Further facts regarding the 1 Sugar Hollow Road property will be discussed in the Memorandum of Decision in the companion case of even date herewith.

127 Park Avenue, Danbury, Connecticut is a .498–acre parcel with a one-story building occupied by a restaurant/lounge, the only tenant on that parcel. Immediately next door is 125 Park Avenue. 125 and 127 Park Avenue share a common entrance and exit. 125 Park Avenue, Danbury, Connecticut is .87–acre parcel with a two-story building. The entire building is occupied by one tenant, the Military Museum of Southern New England, Inc. (MMSNE). MMSNE pays no rent. Between 1956 and 1962 George P. Valluzzo purchased both Park Avenue properties, one with the existing restaurant and the second with a rental house. In 1970 George P. Valluzzo demolished the house and built a one-story machine shop at 125 Park Avenue. He ran his precision metal parts business both at that location as well as at 1 Sugar Hollow Road. In 1988 the entire manufacturing business was moved to Bethel, Connecticut vacating both the Sugar Hollow Road and Park Avenue locations. Eventually the buildings housing the business at both Danbury locations were demolished.

***3** In 1984 John V. Valluzzo created MMSNE, a Connecticut non-stock corporation with IRS 501(c)(3) tax-free status. In 1995 the existing building at 125 Park Avenue was converted to a two-story building so that MMSNE could occupy both floors. In the original 1994 lease between George P. Valluzzo and MMSNE rent was paid by MMSNE to George P. Valluzzo. George P. Valluzzo would then donate the rent back to MMSNE. Valluzzo Realty Associates, LLC was formed on January 2, 2000. Ex. 45. Title to 125–127 Park Avenue, Danbury was conveyed to the LLC. Ex. 79. Since that conveyance the defendant, Valluzzo Realty Associates, LLC, has been the record title owner of the real property at 125–127 Park Avenue, Danbury, Connecticut. This is verified by the title searches in evidence. Ex. 65 and 66. MMSNE did not pay rent after George P. Valluzzo's November 14, 2002 death but paid for the utilities as well as certain structural repairs. The tax returns verify that no rent was paid by MMSNE.2003, Form 8825, line 2, Ex. 40; 2004, Form 8825, line 2, Ex. 41. No cash payments have been made by MMSNE to the current owners of the property, the defendant, Valluzzo Realty Associates, LLC, after 2002.

The Operating Agreement of Valluzzo Realty Associates, LLC was executed on January 2, 2000 by the following members: George Valluzzo, John V. Valluzzo, Cynthia Kasper Valluzzo, David Valluzzo, Carla Ann Hurtado and Joan Valluzzo. Ex. 45. The first paragraph of the Operating Agreement names the plaintiff as a member and Schedule B lists the plaintiff's "Percentage Membership Interest" as "15%." Cynthia Kasper Valluzzo is the plaintiff, Cynthia Kasper. At issue in both the Florida dissolution and in this trial is whether or not Cynthia Kasper is the owner of a 15% membership interest in Valluzzo Realty Associates, LLC. After consideration of all of the evidence and the pertinent law, the court finds that the plaintiff has owned consistently since January 2, 2002 a 15% membership interest in Valluzzo Realty Associates, LLC. This finding is supported by the following facts.

(1) The Operating Agreement of the LLC dated January 2, 2000, names the plaintiff as a 15% member. Ex. 45, Schedule B.

(2) The Operating Agreement in paragraph 6(a) states: "JOHN V. VALLUZZO shall act as Manager until his resignation, death or incapacity. If JOHN V. VALLUZZO cannot act as Manager, CYNTHIA KASPER VALLUZZO shall act as successor manager."

(3) The Federal income tax returns and K–1s filed by the LLC since 2002 show Cynthia Kasper as the owner of a 15% membership interest in the LLC. Ex. 39–44, Ex. 70 and 71. The 2000 and 2001 LLC tax returns were not in evidence. The 2002 LLC tax return shows that Cynthia Kasper owned a 15% membership interest on January 1, 2002.

(4) The above LLC Federal tax returns were signed by John V. Valluzzo.

(5) The Florida matrimonial proceedings found that Cynthia Kasper was a 15% owner of the LLC, although the Florida trial court misidentified various entities. Ex. 95.

***4** (6) John V. Valluzzo admitted in testimony in this trial that the plaintiff was a member of the LLC.

(7) The defendants' counsel conceded at oral argument on the last trial date that the plaintiff was a 15% member of the LLC, despite the fact that John V. Valluzzo contested her 15% ownership in the LLC in the Florida dissolution action as well as for twenty-six of the twenty-seven days of trial in this Connecticut lawsuit.

The First Count alleges that John V. Valluzzo, as the manager of and a member of Valluzzo Realty Associates, LLC, breached his fiduciary duty to the plaintiff, Cynthia Kasper.

> As a preliminary matter, a review of some general principles governing limited liability companies is warranted. [Limited liability companies] are hybrid entities that combine desirable characteristics of corporations, limited partnerships, and general partnerships. [They] are entitled to partnership status for federal income tax purposes under certain circumstances, which permits [limited liability company] members to avoid double taxation, i.e., taxation of the entity as well as taxation of the members' incomes ... Moreover ... members, unlike partners in general partnerships, may have limited liability, such that ... members who are involved in managing the [limited liability company] may avoid becoming personally liable for its debts and obligations." (Internal quotation marks omitted.) *Weber v. U.S. Sterling Securities, Inc.*, 282 Conn. 722, 729, 924 A.2d 816 (2007). "A limited liability company is a distinct legal entity whose existence is separate from its members ... A limited liability company has the power to sue or be sued in its own name; see General Statutes §§ 34–124(b) and 34–186; or may be a party to an action through a suit brought in its name by a member. See General Statutes § 34–187." (Citation omitted.) *Wasko v. Farley*, 108 Conn.App. 156, 170, 947 A.2d 978 (2008).

David Caron Chrysler Motors, LLC v. Goodhall's, Inc., 122 Conn .App. 149, 159 (2010).

The plaintiff did not furnish any legal authority that a member of an LLC owes a fiduciary duty to the LLC itself or another LLC member.

> Our Supreme Court has chosen to maintain an imprecise definition of what constitutes a fiduciary relationship in order to ensure that the concept remains adaptable to new situations. See *Alaimo v. Royer*, 188 Conn. 36, 41, 448 A.2d 207 (1982) (our Supreme Court has "specifically refused to define a fiduciary relationship in precise detail and in such a manner as to exclude new situations, choosing instead to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other" [internal quotation marks omitted]). Consequently, under Connecticut law, a fiduciary or confidential relationship is broadly defined as a relationship that is "characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other ... The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him." (Citations omitted.) *Dunham v. Dunham*, 204 Conn. 303, 322, 528 A.2d 1123 (1987), overruled in part by *Santopietro v. New Haven*, 239 Conn. 207, 213 n. 8, 682 A.2d 106 (1996).

***5** *Ahern v. Kappalumakkel*, 97 Conn.App. 189, 194 (2006).

Partners owe a fiduciary duty to other partners. *Konover Development Corp. v. Zeller*, 228 Conn. 206, 226 (1994); *Oakhill Associates v. D'Amato*, 228 Conn. 723, 727 (1994). Some trial courts have held that like a partner in a partnership, a member of an LLC has a fiduciary duty to other members. *Ruotolo v. Ruotolo*, Superior Court, judicial district of New Haven, Docket Number CV 09–5026804 S (December 29, 2009, Jones, J.) (managing member of LLC has a fiduciary duty to the LLC and the other individual members); *Wilcox v. Schmidt*, Superior Court judicial district of Windham at Putnam, Docket Number WWM CV 04–4001126 S (June 3, 2010, Swords, J.); *Yavarone v. Jim Moroni's Oil Service, LLC*, Superior Court, judicial district of Middlesex at Middletown, Docket Number CV 03–0102318 S (February 18, 2005, Aurigemma, J.). The court finds that the appellate case law does not support conclusions recited in these cases that a LLC member is similar to a partner in a partnership.

The Uniform Limited Liability Corporation Act (ULLCA) provides that members of a member-managed LLC owe a fiduciary duty of loyalty and care to the company and its other members. Connecticut has not adopted the ULLCA. Valluzzo Realty Associates, LLC is a manager-managed LLC, not a member-managed LLC. Ex. 45, paragraph 6(a).

The court rejects the plaintiff's claim that a member of a LLC owes a fiduciary duty to another member.

The ULLCA states that a manager in a manager-managed LLC owes a fiduciary duty to the members. A manager of an LLC is the equivalent of an officer of a stock corporation. "An officer and director occupies a fiduciary relationship to the corporation and to its stockholders." *Pacelli Brothers Transportation, Inc. v. Pacelli*, 189 Conn. 401, 407 (1983). The managing partner of a partnership owes a fiduciary duty to the partnership and each partner. *Gorelick v. Montanaro*, 119 Conn.App. 785, 806–07 (2010). General partners owe a fiduciary duty to limited partners. *Konover Development Corp. v. Zeller, supra*, 228 Conn. at 230. If there is no statute to the contrary, an LLC is controlled by general corporate law. *Litchfield Asset Management Corporation v. Howell*, 70 Conn.App. 133, 147 (2002); *Sturm v. Harb Development, LLC*, 298 Conn. 124, 131, fn.7 (2010). On its face Gen.Stat. § 34–141 imposes a duty of good faith, not a fiduciary duty. There is no statute stating whether or not the manager of an LLC owes a fiduciary duty to the LLC and the other members. Gen.Stat. §§ 34–140 through 34–144. The court finds that a manager of a manager-managed LLC owes a fiduciary duty to the LLC and its members.

A fiduciary relationship is characterized by a "unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." *Dunham v. Dunham, supra*, 204 Conn. at 322. Because fiduciary relationships are imbued with the utmost trust, the parties are bound to "act honestly, and with the finest and undivided loyalty to the trust, not merely with that standard of honor required of men dealing at arm's length and the workaday world, but with a punctilio of honor the most sensitive. *Konover Development Corp. v. Zeller, supra*, 228 Conn. at 220. Because the superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him once a plaintiff has established a fiduciary duty, the burden then shifts to the defendant fiduciary to prove fair dealing by clear and convincing evidence. *Id.* at 229; *Dunham v. Dunham, supra*, 204 Conn. at 322–23.

***6** The plaintiff has proven that the defendant, John V. Valluzzo, as the LLC manager, has a fiduciary duty to the plaintiff, the LLC itself and the other LLC members. She has proven that he took management fees starting when their marriage was deteriorating four years into the LLC's existence in contravention of the Operating Agreement, that he made substantial charitable donations to MMSNE, his creation and "hobby" as described by the Florida dissolution of marriage trial judge, in contravention of the Operating Agreement or formal approval by the LLC members. He chose on behalf of MMSNE not to pay rent to the LLC. By permitting MMSNE not to pay rent, the income from the restaurant that would have been available to pay out in cash distributions to the LLC members, had to be devoted to other LLC expenses, thus preventing any cash distributions being made by the LLC, ever. These actions by John V. Valluzzo were breaches of his fiduciary duty. These are acts of self-dealing, "a participation in a transaction that benefits oneself instead of another who is owed a fiduciary duty." *Charter Oak Lending Corp., LLC v. August*, 127 Conn.App. 428, 442, fn.9 (2011). The plaintiff has sustained her burden of proof that John V. Valluzzo, as manager of the LLC, breached his fiduciary duty to the plaintiff.

John V. Valluzzo only testified when called as a witness for the plaintiff. He admitted in a pleading dated November 19, 2010 (# 271.00) that he was going to testify and offer other witnesses and exhibits on his behalf. John V. Valluzzo rested his case without calling a single witness. He failed to prove fair dealing by clear and convincing evidence as to the four monetary claims made by the plaintiff as well as to the accounting and access to the LLC's books and records claims.

The Third Count claims a breach of contract. The contract at issue is the Operating Agreement. Ex. 45. The management fees paid, charitable donations taken, the failure to permit access to the LLCs books and records, and failure to pay cash distributions to the LLC members are violations of the terms of the Operating Agreement. The Operating Agreement was executed by Cynthia Kasper and John V. Valluzzo. The court will discuss the failure of consideration Fourth Special Defense later in this Memorandum of Decision. The plaintiff has sustained her burden of proof that John V. Valluzzo breached the Operating Agreement.

The Fourth Count alleges breach of a statutory duty under Gen.Stat. § 34–141(a): "A member or manager shall discharge his duties under ... the operating agreement, in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in the manner he reasonably believes to be in the best interests of the limited liability company." By its plain language this is a duty of good faith. It does not rise to the level of a fiduciary duty. A few cases cite Gen.Stat. § 34–141 for

the proposition: "like a partner in a partnership, a member of a limited liability company has a fiduciary duty to the other members." *The Zanker Group, LLC v. Summerville at Litchfield Hills, LLC,* Superior Court, judicial district of New Haven at New Haven, Docket Number CV 04–4015238 S (October 24, 2005, Munro, J.). Despite these trial court decisions, there is no appellate authority stating that the good faith provision of Gen.Stat. § 34–141 amounts to proof of a fiduciary duty. Thus the plaintiff's breach of statutory duty must be analyzed in terms of a breach of good faith. There is no shifting of the burden of proof to the fiduciary to prove fair dealing by clear and convincing evidence in a breach of good faith claim. General Statutes § 34–141 sets forth a duty of good faith, which is not the same as the duty of a fiduciary, which goes beyond good faith. *Calpitano v. Rotundo,* Superior Court, judicial district of New Britain at New Britain, Docket Number CV 11–6008972 S (August 3, 2011, Swienton, J.) [52 Conn. L. Rptr. 464].

***7** "An action for breach of the covenant of good faith and fair dealing requires proof of three essential elements: (1) that the plaintiff and the defendant were parties to a contract under which the plaintiff reasonably expected to receive certain benefits; (2) that the defendant engaged in conduct that injured the plaintiff's right to receive benefits it reasonably expected to receive under the contract; and (3) that when committing the acts by which it injured the plaintiff's right to receive under the contract, the defendant was acting in bad faith." *First Service Williams Connecticut, LLC v. Gubner,* Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket Number FST CV 10–6002996 S (September 27, 2011, Brazzel–Massaro, J.).

In order to prevail on a claim of bad faith it is necessary for the complaint to allege a specific act that was performed purposely and with a sinister intent. *Id.*

> Bad faith has been defined in our jurisprudence in various ways. Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive ... Bad faith means more than mere negligence; it involves a dishonest purpose ... [B]ad faith may be overt or may consist of inaction, and it may include evasion of the spirit of the bargain ...

(Internal quotation marks omitted.) *Brennan Associates v. OBGYN Speciality Group, P.C.,* 127 Conn.App. 746, 759–60, cert. denied, 301 Conn. 917 (2011).

Good faith and fair dealing mean an attitude or state of mind denoting honesty of purpose, freedom from intention to defraud and being faithful to one's duty or obligation. *Buckman v. People Express, Inc.,* 205 Conn. 166, 171 (1987). The definition [of good faith] requires not only honesty in fact but also observance of reasonable expectations of the contracting parties as they presumably intended. *Verrastro v. Middlesex Ins. Co.,* 207 Conn. 179, 190 (1988).

The court has examined John V. Valluzzo's self-dealing in regards to the management fees, charitable contributions made by the LLC, no rent being paid by MMSNE, and failure to furnish access to the LLC's books and records under the good faith standard of a reasonable manager of an LLC. Much of those actions took place in the context of a deteriorating marriage. Despite the overwhelming evidence to the contrary, he has contested her ownership in both entities throughout the Florida dissolution trial continuing in the appeal and throughout most of this trial. The court finds that the plaintiff has sustained her burden of proof that John V. Valluzzo as manager of the LLC has violated his duty of good faith under Gen.Stat. § 34–141 to the plaintiff in regards to the four monetary claims and access to the LLC's books and records.

The plaintiff is claiming monetary damages as against both defendants in this LLC lawsuit in the total sum of $147,461.10, each based on her 15% membership interest in the LLC. That sum is broken down into four separate claims: (1) $3,802.50 representing improper management fees paid to John V. Valluzzo; (2) $8,764.50 for improper charitable contributions made to MMSNE; (3) $15,981.60 for her 15% portion of the undistributed rent from the restaurant at 127 Park Avenue; and (4) $118,912.50 for her 15% of the use and occupancy owed by MMSNE for its occupancy of the land and the two-story building at 125 Park Avenue, Danbury, Connecticut for the years 2000 through 2009. The court will discuss each of these monetary claims separately.

***8** (1) $3,802.50 is the claim for Cynthia Kasper's 15% of the LLC management fees paid to John V. Valluzzo. Valluzzo Realty Associates, LLC was formed on January 2, 2000. There were six original members of the LLC all of

whom signed the twenty-eight-page Operating Agreement. Ex. 45. Those original members were George Valluzzo, his son and the defendant, John V. Valluzzo, Cynthia Kasper Valluzzo a/k/a Cynthia Kasper, the plaintiff in this instant lawsuit, David Valluzzo, Carla Ann Hurtado a/k/a Carla Hurtado, and Joan Valluzzo n/k/a Joan Mazzella, the three children of John V. Valluzzo from a previous marriage. The first WHEREAS clause states that George Valluzzo formed this limited liability company operating under the name of Valluzzo Realty Associates, LLC. The second WHEREAS clause states that the LLC "has been formed for the principal purpose of owning and leasing real property located on Park Avenue in Danbury, Connecticut." The third WHEREAS clause states that George Valluzzo gifted 60% of his interests in the LLC to members of his family. Schedule B notes the following LLC membership percentages as of January 2, 2000; George Valluzzo 40%; John V. Valluzzo 15%; Cynthia Kasper Valluzzo 15%; and David Valluzzo, Carla Ann Hurtado and Joan Valluzzo each 10%. The fourth WHEREAS clause provides that "the Company shall be managed by a Manager designated herein."

Paragraph 6 of the Operating Agreement is three pages in length and is entitled *Management.* Paragraph 6(a) states; "The overall management and control of the business and affairs of the Company shall be vested in the Manager (the 'Manager'). JOHN V. VALLUZZO shall act as Manager until his resignation, death or incapacity. If JOHN V. VALLUZZO cannot act as Manager, CYNTHIA KASPER VALLUZZO shall act as successor Manager." Paragraph 6(d) states: "The Manager shall be entitled to reasonable compensation for services rendered to the Company, as may be agreed upon from time to time by vote of Members holding a majority of the Membership Interests in the Company. The Company shall reimburse the Manager for all reasonable expenses incurred by him on behalf of the Company ." The Operating Agreement did not designate any dollar amount or percentage of rent as reasonable compensation for the manager's services. No document was submitted during the trial to indicate that the members had voted for a rate of compensation for the manager during the years through 2009. The federal income tax returns of Valluzzo Realty Associates, LLC for the years 2002 through 2009 were offered in evidence. Ex. 39–44, 70, and 71. An examination of those eight income tax returns reveals that John V. Valluzzo did not take a management fee for the years 2002 and 2003. No management fees are contained within Ex. 39 and 40, the tax returns for those two years. The LLC tax returns for 2000 and 2001 were not in evidence.

Cynthia Kasper and John V. Valluzzo started to have marital problems in 2004. The Florida dissolution action was commenced March 10, 2006. For the first time in 2004 the LLC paid a management fee. The management fee was paid to the defendant, John V. Valluzzo, in the amount of $6,750. Ex. 41 and Ex. 97. Thereafter the following management fees were paid to the defendant, John V. Valluzzo, by the LLC: 2005 $3,600, Ex. 42; 2006 $3,600, Ex. 43; 2007 $3,600, Ex. 44; 2008 $3,900, Ex. 70; and 2009 $3,300, Ex. 71. These management fees total $24,750. The 2008 LLC tax return in Schedule M–1 and Statement 7 indicates management fees of $300 for "Expenses Recorded on Books Not Deducted in Return." Ex. 70. The 2009 LLC tax return in Schedule M–1 Statement 9 indicates management fees of $300 for "Expenses Recorded on Books Not Deducted in Return." Ex. 71. The 2009 LLC tax return in Schedule L Statement 6 indicates "Management Fees Payable of $300." Ex. 71. The court finds that each of these two $300 sums mentioned in the 2008 and 2009 LLC tax returns were additional management fees paid by the LLC to John V. Valluzzo. That brings the total of management fees paid by the LLC to John V. Valluzzo from 2004 through and including 2009 to $25,350. Of that $25,350 sum Cynthia Kasper is claiming 15% or the sum of $3,802.50.

***9** The court finds that the plaintiff has proven that John V. Valluzzo received $25,350 management fees from the LLC for the years 2004 through 2009, that no meeting of the LLC had ever occurred up through 2009 other than the execution of the Operating Agreement, that the members did not vote for any dollar or percentage amount of management fees up through 2009, the Operating Agreement does not contain a dollar or percentage amount for management fees up, and the Operating Agreement was never amended. The court finds John V. Valluzzo was not entitled to collect management fees for the years 2004 through and including 2009. The court finds that John V. Valluzzo was entitled to be reimbursed "for all reasonable expenses incurred by him on behalf of the Company." Ex. 45, paragraph 6(d). There was no proof of any "reasonable expenses incurred" by John V. Valluzzo on behalf of the LLC while he was managing the LLC. The court finds that "reasonable expenses incurred" are out of pocket costs such as telephone, postage and expenses actually paid by the Manager and does not include "reasonable compensation for services rendered." The court finds "reasonable expenses incurred" does not include management fees. The court finds that the plaintiff's 15% share of the $25,350 management fees is $3,802.50.

The defendants are claiming that their six Special Defenses and the plaintiff's lack of standing as raised in the defendant's August 21, 2010 Motion to Dismiss (# 253.00) prevent Cynthia Kasper from making this monetary claim. The court will discuss these defenses later in this Memorandum of Decision.

(2) $8,764.50 is the claim for Cynthia Kasper's 15% of the charitable contributions made by the LLC to MMSNE. John V. Valluzzo formed MMSNE as a non-profit non-stock corporation in 1984. It has tax-exempt status under IRS Code Section 501(c)(3). He is the founder, chief officer and day to day operator of MMSNE.

The MMSNE has occupied the 125 Park Avenue building and land since 1995. There is no provision in the Operating Agreement authorizing the LLC to make any charitable contributions, let alone to MMSNE. There was no evidence of any LLC meetings prior to 2010 authorizing such charitable contributions. No LLC minutes were offered in evidence for that period of time. The plaintiff's claim of improper charitable contributions by the LLC to MMSNE is in addition to the imputed rent and/or use and occupancy monetary claim based on the money MMSNE should have been paying to the LLC as the owners of the land and building. The plaintiff is claiming that from 2002 through and including 2009 based upon the aforementioned LLC income tax returns for those years, the following charitable contributions were made to MMSNE; 2002 $37,430, Ex. 39, Schedule K, Statement 3; 2005 $6,000, Ex. 42, Schedule K, Statement 3; 2006 $5,000, Ex. 43, Schedule K, Statement 3; and 2009, $10,000 Ex. 71, Schedule K, Statement 3. These charitable contributions shown on the LLC income tax returns in evidence total $58,430 and as a result the plaintiff claims she is entitled to 15%; $8,764.50. This court has examined the aforementioned income tax returns for the LLC from 2002 to 2009. These LLC tax returns verify the fact that charitable contributions are reflected therein made by the LLC to MMSNE in the total amount of $58,430. The plaintiff has sustained her burden of proof. Unless one of the defenses raised by the defendants is applicable, the plaintiff is entitled to $8,764.50 for inappropriate charitable contributions made by the LLC to MMSNE. The court will discuss these defenses in a separate portion of this Memorandum of Decision.

***10** (3) $15,981.60 is the claim for Cynthia Kasper's 15% share of rents paid by the restaurant at 127 Park Avenue for the years 2002 through 2009, years in which the plaintiff received no cash distributions from the LLC. This claim is also based upon the aforementioned income tax returns filed by the LLC for the years 2002 through 2009. There were no LLC income tax returns in evidence for 2000 and 2001. At oral argument on July 13, 2011 the plaintiff limited this restaurant rent claim to the years 2002 through and including 2009. She was no longer claiming net restaurant rent for the years 2000 and 2001 in the amount of $6,900 as she testified to on May 19, 2011.

The court finds that the restaurant/lounge paid rent to the LLC each year from 2002 through 2009. That rent is shown in each of the LLC tax returns in Form 8825. Expenses relating to the restaurant property are also shown on Form 8825. For the year 2002 the gross rents were $72,248. In 2002, MMSNE paid rent to the LLC. The LLC made a charitable donation to MMSNE of $37,430 in 2002. The court finds that this $37,430 charitable contributions was the same amount as MMSNE paid rent to the LLC in 2002, which rent was donated back to MMSNE by the LLC. Thus the restaurant's gross rent paid for 2002 was $72,248 less $37,430 or $34,818. Ex. 39. The restaurant paid gross rents thereafter to the LLC: 2003, $39,600; 2004 $36,300; 2005 $40,628; 2006 $36,300; 2007 $42,900, 2008 $41,050 and 2009 $41,400. Ex. 40–44, 70 and 71. Thus the restaurant paid rent to the LLC for 2002 through and including 2009 the sum of $315,608. From these gross rents the LLC had to pay the following expenses: insurance, professional fees, interest, real estate taxes, repairs, utilities, and bank fees. Each of these expenses are contained in Form 8825 for the LLC's 2002 through 2009 tax returns. These expenses must be deducted from the gross restaurant rent to get the net rental income of the LLC attributable to the restaurant. It is noted that the management fees paid by the LLC to John V. Valluzzo have been included as expenses incurred by the LLC in the Form 8825 totals for 2004 through 2009. These management fees must be deleted from the expenses since the plaintiff is making a separate claim for the $25,350 management fees. The charitable deductions made by the LLC to MMSNE were not deducted on Form 8825.

The plaintiff claims that the net restaurant income after deducting usual expenses excluding the management fees claim is $106,544 for the eight years 2002 through and including 2009. She is claiming 15% as monetary damages, being the sum of $15,981.60. In arriving at the $106,544 the plaintiff apparently totaled the line 21 figures from each Form 8825. Line 21 of Form 8825 is entitled “Net income (loss) from rental real estate activities.” The court has added all line 21 figures from Form 8825 and subtracted $970 on line

21 for 2004 and the result is exactly $106,544. The plaintiff did not subtract the $37,430 for the portion of the 2002 rent paid by MMSNE from the income side. The plaintiff did not subtract from the expense side the $25,350 management fees for which she is making a separate monetary claim. Both the $32,430 MMSNE 2002 rent and $25,350 management fees must be taken into account in order to obtain a true "Net income (loss) from rental real estate activities" attributable only to the restaurant at 127 Park Avenue. The court has done those calculations. Thus the gross rent of $315,608 for the years 2002 through and including 2009 is reduced by $37,430, the rent MMSNE paid in 2002, resulting in a gross restaurant rent for those eight years of $278,178. The expenses for those eight years must be reduced by the $25,350 management fees that are included in Form 8825 but represent a separate monetary claim made by the plaintiff in this lawsuit. The expenses are shown on line 18 in Form 8825 and they total $243,882. These expenses must be reduced by the management fees paid and the result is $218,532 ($243,882–$25,350 = $218,532). Thus the gross restaurant rent of $278,178 must be reduced by the $218,582 expenses to get the net restaurant rents for these eight years. The total is $59,646 ($278,178–$218,532 = $59,646).

***11** No cash distributions were ever paid to Cynthia Kasper by the LLC from January 2, 2000, when the LLC was formed, to the date of trial. The court finds that the plaintiff is entitled to a 15% distribution of the net rents received by the LLC from the restaurant for the years 2002 through 2009. Those net restaurant rents are $59,646. This 15% is $8,946.90. The plaintiff is entitled to $8,946.90 as damages unless one or more of the defenses are applicable, which defenses will be discussed later in this Memorandum of Decision.

(4) $118,912.50 is the claim for Cynthia Kasper's 15% of the imputed use and occupancy that should have been paid by MMSNE for the land and building it occupies at 125 Park Avenue, Danbury, Connecticut for the years 2000 through and including 2009. Occupancy payments were made by MMSNE prior to 2008. The 2002 occupancy payment made by MMSNE to the LLC was donated back to MMSNE in 2002. Ex. 39, line 8, statement 3. Prior to 2002 other occupancy payments made by MMSNE may have been donated back to MMSNE by Valluzzo Realty Associates, LLC. The income tax returns for the years 2003 through 2009 show that no occupancy payments were made to the LLC by MMSNE despite the fact that the museum has been consistently occupying and using the land, building and premises at 125 Park Avenue for its museum purposes for those years. George V. Valluzzo died on November 14, 2002. The parties stipulated, despite the facts appearing in the LLC income tax returns in evidence, that MMSNE paid $39,600 to the LLC for each of the years 2002, 2003 and 2004. See 2004 MMSNE tax return. Ex. 5.

The plaintiff's claim for imputed use and occupancy is based on the square footage of the museum building and the actual rent paid by the adjacent restaurant per square foot. John V. Valluzzo testified about the square footage and rent of the restaurant building and the square footage and use of the museum. A professional real estate appraisal was in evidence. The plaintiff claims that the imputed MMSNE use and occupancy payments for each year should have been $79,275. Times the ten years from 2000 through and including 2009, the total is $792,750. The plaintiff claims that her 15% share is $118,912.50.

"The plaintiff has the burden of proving the extent of the damages suffered ... Although the plaintiff need not provide such proof with [m]athematical exactitude ... the plaintiff must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate ... As we have stated previously, the determination of damages is a matter for the trier of fact ..." *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 65 (1998).

The defendants had two real estate appraisals for 125–127 Park Avenue done on January 31, 2008 and for each parcel. Ex. 65 and 66. The appraiser testified and the redacted appraisal reports were placed in evidence. The rents paid by the restaurant were in evidence. The restaurant at 127 Park Avenue is a 2,336 square feet single-story building. Ex. 82, Ex. 66. The appraisal deleted references to comparable square footage rents for other property in the Danbury area. Ex. 66 did note that the rental for the restaurant from December 1, 2002 through November 30, 2007 was $3,300 per month, $39,600 per year. This is generally consistent with the LLC's income tax returns for those years. Using the 2,336 square footage, that $39,600 amount calculates to $16.95 per square foot per year. The plaintiff used this $16.95 per square foot for the entire period from January 2000 through and including December 2009. The appraisal report contained no rent for 2000, 2001 and the first 11 months of 2002. The court notes that the actual rent from December 1, 2007 through all of 2009 was $18.49 per square foot per year. Ex. 66, page 21. At trial John V. Valluzzo testified that the current restaurant rent is $43,200 per year. This is exactly $18.49 per square foot per year.

***12** The land and museum building at 125 Park Avenue was also appraised and the appraiser testified. The appraisal in redacted form was in evidence. Ex. 65. The MMSNE building was measured at 11,325 square feet. Ex. 82, Ex. 65. There was no breakdown between the first and second floors. The photos in evidence indicate each floor is approximately the same size. Ex. 6, Ex. 7. Mr. Valluzzo so testified. The court finds that each floor is 5,662 square feet. The appraiser's opinion as to the comparable property rents was redacted. Ex. 65, page 25. Since MMSNE was not paying rent, no actual rent numbers were contained in this appraisal. Somehow the plaintiff has used $79,275 as the annual use and occupancy for 2000 to 2009. The plaintiff used $79,275 as the annual use and occupancy divided by the 11,325 square feet, and determined that the use and occupancy would be exactly $7.00 per square foot per year. There is no evidence before this court justifying $7.00 per square foot per year. There is no support in the evidence for an annual use and occupancy of $79,275 for 125 Park Avenue. The court notes that the appraisal states: "It is presently involved in a lease agreement with the MMSNE, a non profit organization." Ex. 65. No such lease was presented at trial nor otherwise testified to.

The plaintiff testified on direct that she intended to use the square footage rental rate of the restaurant and apply that square footage rental rate to the MMSNE building's square footage. That monetary claim has support in the evidence and in the unredacted portions of the two real estate appraisals. The $7.00 per square foot has no support in the evidence. The court notes that the square footage rent for the 1 Sugar Hollow Road, Danbury, Connecticut rental property was $31.69 per square foot per year. Ex. 64.

The appraisal described the MMSNE building as being two stories and indicates that the primary museum use is on the first floor. Zoning permits for full use of the entire second floor for museum display has not been obtained. The first floor of the two-story building is totally devoted to museum purposes with lobby, lavatories, gift store and public museum display areas. Storage of museum equipment, offices, research library, repair and facilities for maintenance of the museum and its collection are on the second floor. There is no elevator. There is a partial basement of approximately 700 square feet with no basement windows. The land in front of and to the side of the building is occupied by public access, employee parking and a display area for various military vehicles and armaments including tanks and artillery pieces.

The court will not allocate any use and occupancy for the 700 square foot basement.

Since the second floor has no zoning permit, is used for non-public areas, offices, and storage area and is not serviced by an elevator, the court will calculate the fair use and occupancy of the second floor at half the rate for the first floor. Although the restaurant at 127 Park Avenue was paying $18.49 per square foot rent after December 1, 2007, the court finds that the use of the $16.95 per square foot rent fairly states the fair market rent for the entire period of January 2000 until December 31, 2009 for the first floor at 125 Park Avenue. The higher rent at $18.49 after December 1, 2002 should offset the presumably lower rent for 2000 and 2001, thus establishing $16.95 as the average net per square foot. At $16 .95 times 5,662 square feet the court finds the fair market use and occupancy for the first floor of 125 Park Avenue is $95,970 per year. The fair market use and occupancy of the second floor is one-half: $47,985 per year. The use and occupancy for the entire premises is $143,955 per year. For the ten years from January 1, 2000 until December 31, 2009 the total use and occupancy is $1,439,550.

***13** Since there was no agreement there can be no rent. *Welk v. Bidwell,* 136 Conn. 603, 608 (1950); *Bushell Plaza Development Corp. v. Fazzano,* 38 Conn.Sup. 683, 685 (1983). A nontenant occupier is obligated to pay a fair amount for the use and occupancy of the premises even though there is no rental agreement. *Lonergan v. Connecticut Food Store, Inc.*, 168 Conn. 122, 131 (1975). The court can make a finding of reasonable use and occupancy. *Id.*, at 132.

The parties have stipulated that MMSNE paid $39,600 to the LLC for 2002 and $39,600 for each of the years 2003 and 2004. These three sums must be subtracted from the $1,439,550 leaving the sum of $1,320,750.

Therefore the total fair market value of the use and occupancy of 125 Park Avenue for the years 2000 through and including 2009 is $1,320,750 ($1,439,550–$118,800 = $1,320,750). The plaintiff's 15% share is $198,113. This figure does not take in consideration any landlord expenses attributable to 125 Park Avenue. MMSNE is exempt from Danbury real estate taxes and pays its own utilities. There was no evidence of the LLC's direct costs for 125 Park Avenue. The appraiser used 10% of the annual gross rents for reserves for "Vacancy and Rent Loss" and 5% of the annual gross rents for "Structural Repairs/Reserves for Replacements." Ex.

65, page 25–26. The court finds this 15% to be a reasonable estimate of the landlord's expenses for 125 Park Avenue. This 15% reduces the plaintiff's $198,113 share to $168,396. If the entire second floor use and occupancy is computed using $16.95 per square foot, the plaintiff's 15% partnership share in the MMSNE use and occupancy would increase to $224,528.

Unless one of the defenses raised by the defendants is applicable, the plaintiff is entitled to $168,480 in her Claims for Relief 3. Compensatory Damages for the MMSNE's use and occupancy not paid for the years 2000 through 2009.

The plaintiff requests in her June 7, 2007 Claims for Relief. "1. Removal of Defendant John V. Valluzzo as manager of Defendant Valluzzo Realty Associates, LLC, and appointment of plaintiff Cynthia Kasper as successor manager." The plaintiff has furnished no legal authority for the court to enter such an order. The LLC Operating Agreement states that John V. Valluzzo shall act as manager until his resignation, death or incapacity. Ex. 45, paragraph 6(a). There is no evidence that he has resigned. He was alive and well throughout the trial. He testified and there was no evidence that he was incapacitated in any fashion.

John V. Valluzzo engaged in self-dealing with the LLC in contradiction of the terms of the Operating Agreement, by paying himself a management fee, collecting no rent for MMSNE, the non-profit corporation that he formed, developed and operated, deducting certain charitable contributions from the LLC to MMSNE without formal LLC approval and not distributing the net restaurant rents to the LLC members. These activities could cause monetary damages but removal as a manager is not the appropriate remedy. The court declines to remove John V. Valluzzo as manager of the LLC.

***14** The court finds the issues on Claims for Relief 1, for the defendants.

Plaintiff's Claims for Relief requested; "4. A temporary and permanent injunction prohibiting charitable contributions from Defendant Valluzzo Realty Associates, LLC to the Military Museum of Southern New England, Inc." The court has already found that these charitable contributions were not appropriate and that the plaintiff has sustained her burden of proof. The plaintiff's complaint fails to allege an inadequate remedy of law or irreparable injury. *Pequonnock Yacht Club, Inc. v. Bridgeport*, 259 Conn. 592, 598–99 (2002). Monetary damages are an appropriate remedy, if the plaintiff has standing. The plaintiff has failed to prove an inadequate remedy of law and irreparable injury. *Walton v. New Hartford*, 223 Conn. 155, 165 (1992). The complaint has not been verified as required by Gen.Stat. § 52–471(b). A request for injunctive relief is addressed to the discretion of the court. *Wehrhane v. Peyton*, 134 Conn. 486, 498 (1948). The court will exercise its discretion in denying the plaintiff's injunctive relief. For all of the above reasons, the court denies the application for a temporary and permanent injunction prohibiting charitable contributions from the defendant, Valluzzo Realty Associates, LLC, to the Military Museum Southern New England, Inc.

The court finds the issues on Claims for Relief 4, for the defendants.

This finding is in no way approval by the court of future donations being made either to the Military Museum of Southern New England, Inc., or to any other entity without meeting the appropriate procedural requirements by the LLC, its members, Connecticut law and/or the Operating Agreement.

Plaintiff is requesting in her Claims for Relief "5. Attorneys Fees and Costs." At the trial the plaintiff represented herself. She is not an attorney. A self-represented non-attorney party to litigation cannot obtain an award of attorney fees. *Lev v. Lev*, 10 Conn.App. 520, 575–76 (1987); *Jones v. Ippoliti*, 52 Conn.App. 199, 212 (1999). The writ, summons and complaint and the initial pleadings in both this lawsuit and the partnership lawsuit were filed on behalf of the plaintiff by her then counsel of record. No attorney's bills or contemporaneous time records from that law firm were submitted in evidence. There was no evidence of the hourly rate, reasonableness of the attorneys fees, or contemporaneous time records from the attorneys. No doubt Cynthia Kasper incurred and paid fees to her attorney. The court disallows the claim for attorneys fees. *Smith v. Snyder*, 267 Conn. 456, 477, 479 (2004).

She makes an independent damage claim for "costs." In support of that claim, she cites statutory and Practice Book authority for court costs. She submitted a twenty-four-page affidavit of costs totaling $39,818.89. Ex. 102. Our procedures do not permit trial courts to directly award taxable costs. The plaintiff, if she is successful in this litigation, is entitled to a taxation of costs pursuant to P.B. § 18–5. In the first instance the successful plaintiff must submit a claim of costs to the clerk for taxation. Parties are entitled

to request a hearing before the Clerk of the Superior Court on the taxation of costs. After the Clerk enters a taxation of costs, only then can the trial court consider costs. "Either party may move the judicial authority for a review of the taxation by the clerk by filing a motion for review of taxation of costs within twenty days of the issuance of the notice of taxation by the clerk." P.B. § 18–5(b). Even then court costs can only be taxed under statutory authority such as Gen.Stat. §§ 52–257, 52–260. *Levesque v. Bristol Hospital, Inc.*, 286 Conn. 234, 263 (2002); *Boczer v. Sella*, 113 Conn.App. 339, 343 (2009). The plaintiff has failed to follow the proper procedures for the determination of court costs. The court therefore leaves the issues of taxation of court costs to the clerk in the first instance under P.B. § 18–5 including but not limited to any witness fees under Gen.Stat. § 52–260(g), accounting experts, transcript fees, copying costs, marshal fees, maps, photographs, certified copies, title search fees, West Law access, legal treatises and mileage for witnesses.

***15** The plaintiff is claiming $39,818.89 as a monetary award of damages consistent with her Affidavit of Costs. Ex. 102. She is claiming as damages all her out of pocket costs that have been incurred by her for trial including her transportation to and from Florida by car, to and from Florida by air, to and from Florida by Amtrak overnight train using her car on the train, her lodging during the Florida travel, her lodging in Stamford on trial dates, food, office supplies, computer software, "The Act of Cross Examination" by Frances Wellman, postage, Fed Ex., court transcripts, title searches, legal research on West Law, copying costs, certified copies of affidavits and marshal fees. The plaintiff claims that these sums should be awarded to her by reason of the fact that they are "costs" incurred by her. The court reminded her during trial that she must refer to a statute, practice book rule and/or case law that permits such a damage claim. The court referred her to Gen.Stat. §§ 52–257, 52–260 and the limitation of taxable costs imposed by case law. *Levesque v. Bristol Hospital, supra*, 286 Conn. at 263. No statutory authority or case law was provided at trial authorizing this court to award expenses incurred by a self-represented litigant for travel to and from court along with incidental expenses mentioned in Ex. 102 as an element of damages. *Scottsdale v. Underwriters at Lloyds of London*, Superior Court, judicial district of New Haven at New Haven, Docket Number CV 06–4022710 S (February 8, 2010, Berdon, J.T.R.) [49 Conn. L. Rptr. 293].

The court finds the issues for the defendants on the plaintiff's $39,818.89 as a damage claim.

The plaintiff shall be permitted to claim court costs pursuant to the procedures set forth in P.B. § 18–5 and thus this court's rejection of the plaintiff's $39,818.89 damage claim is entered without prejudice to the plaintiff, as the successful litigant, to seek a taxation of costs consistent with statutory authority and Practice Book procedure.

The plaintiff is requesting in her Claims for Relief, "6. Punitive damages." The plaintiff has cited no statute that permits punitive damages. The only statute cited in her complaint, Gen.Stat. § 34–141, does not provide a punitive damage award. The plaintiff is therefore left to common-law punitive damages, which under Connecticut law is limited to the cost of litigation, i.e., attorneys fees. *Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co.*, 193 Conn. 208, 236 (1984). The plaintiff has not offered "a statement of the fees requested and a description of services rendered" in support of a claim of attorney fees for common-law punitive damages. *Smith v. Synder, supra*, 267 Conn. at 479.

The court finds the issues on the plaintiff's Claims for Relief 6 for the defendants.

The plaintiff is requesting in her Claims for Relief, "7. Interest." The court can award interest for the wrongful detention of money. *Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc.*, 239 Conn. 708, 735 (1997). See discussion of this element in *Sosin v. Sosin*, 300 Conn. 205, 226–35 (2011). In addition the date upon which the wrongful detention began must be determined in order to establish the date from which interest should be calculated. *LaSalla v. Doctor's Associates, Inc.*, 278 Conn. 578, 597–98 (2006). Finally, the court must determine a rate of interest. Connecticut has not established a statutory rate of interest. Gen.Stat. § 37–3a caps interest at no more than 10%. *Sears Roebuck & Company v. Board of Tax Review*, 241 Conn. 749, 763 (1997). The court may take judicial notice of a rate of interest. *Moore v. Moore*, 173 Conn. 120, 123 (1977). Under Gen.Stat. § 37–3a that judicially noticed interest rate may not exceed ten (10%) percent. The court must give the parties an opportunity to be heard on the appropriate rate of interest. *Izard v. Izard*, 88 Conn.App. 506, 509–10 (2005). No hearing has yet been held on the appropriate rate of interest.

***16** There are four monetary claims being made by the plaintiff that she has proven, subject to the issue of standing to make such individual claims and the applicability of the special defenses. Each of these monetary claims was

calculated using numbers for events that occurred in some cases over ten years ago. Most of the figures were obtained from income tax returns. There was no evidence of the exact date those payments were made, just the year they were made. Therefore, the court finds that the four monetary claims were wrongfully withheld from the plaintiff on June 7, 2007, the date of the complaint. The court takes judicial notice that savings bank interest rates are below 1% per annum, credit card interest rates are over 18% per annum and first mortgages on residential real estate are regularly offered at 5% or even less. The court exercises its discretion and hereby selects a prejudgment interest rate of 6.0%. In the event that any party disagrees with the selected rate of interest of 6.0% that party may file a Motion to Reargue. The court will then assign the matter for an evidentiary hearing. The parties are directed to the Federal Reserve website for review of the Historical Date H.15 Selected Interest Rates at *www.federalreserve.gov/releases/h15/data.htm* for whatever assistance is contained in the myriad of financial instruments referenced therein.

The court will calculate the 6.0% interest in this Memorandum of Decision if it determines that the plaintiff has standing to make these four monetary claims and none of the special defenses are applicable.

The plaintiff is requesting in her Claim for Relief "8. Such other and further relief as the court deems equitable." The plaintiff made no such claim in oral argument nor offered any evidence at trial supporting this claim. The plaintiff has abandoned this claim.

The court finds the issues on the plaintiff's Claims for Relief 8 for the defendants.

The plaintiff is requesting in her Claims for Relief: "2. A full accounting of all activities of Defendant Valluzzo Realty Associates, LLC for the period of January 2, 2000 to the present." She has not been permitted to examine and copy various books and records of the LLC despite making a timely demand before commencing this litigation. She has received on a timely basis copies of her K–1s. She did not receive a complete copy of the LLC's income tax returns until this litigation was commenced. In support of this accounting claim she cites Paragraph 12 of the LLC Operating Agreement:

> 12. Books of account; Reports:
>
> (a.) The Company shall keep proper and complete books of account in accordance with good accounting practice. Interest, taxes and other carrying charges shall be treated as deductible items for federal income tax purposes to the extent legally permissible. As soon as practicable, but not more than 120 days after the end of each fiscal year, each Member shall be furnished with a copy of the balance sheet and profit and loss statement of the Company for such year and a statement of distributions and allocations pursuant to Section 7 during in or respect of such year, and the amount thereof reportable for federal and state income tax purposes. The Manager shall keep all other Company records and documents required to be kept by the Act.
>
> ***17** (b.) The Manager shall furnish such other reports as he in his judgment shall deem to be appropriate to advise the Members as to the operations of the Company.
>
> (c.) On least five business days' written notice to the Company, any Member may examine, inspect, audit at his or her own expense, the Company's books, records, accounts and assets (including bank balances and physical properties), either in person or through a certified public accountant, engineer, appraiser or other qualified professionals.
>
> (d.) The Manager shall, for each fiscal year, timely file on behalf of the Company a United States partnership income tax returns and any state and local partnership income tax returns as may be required by law.

"An action for an accounting calls for the application of equitable principles." *Travis v. St. John*, 176 Conn. 69, 74 (1978). "In an equitable proceeding, the trial court may examine all relevant factors to ensure that complete justice is done ... The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court." (Internal quotation marks omitted.) *First National Bank of Chicago v. Maynard*, 75 Conn.App. 355, 358 cert. denied, 263 Conn. 914 (2003). "To support an action of accounting, one of several conditions must exist. There must be a fiduciary relationship, or the existence of mutual and/or complicated accounts, or a need of discovery, or some other special ground of equitable jurisdiction such as fraud." *Mankert v. Elmatco Products, Inc.*, 84 Conn.App. 456, 460, cert. denied, 271 Conn. 925 (2004).

The plaintiff claims that she did not receive the documents referred to in Paragraph 12 of the Operating Agreement. She claims that she has not been provided with access to or copies of the documents required to be kept by an

LLC. Gen.Stat. § 34–144. Plaintiff has also cited statutes relating to stock corporations permitting access to corporate books and records. Corporate statutes are applicable to LLCs, even though LLC is not mentioned in the statutes as long as they do not conflict with the LLC statutes. *Wasko v. Farley,* 108 Conn.App. 156, 170 (2008); *Newlands v. NRT Associates, LLC,* Superior Court, judicial district of Fairfield at Bridgeport, Docket Number CV 08–4027098 S (March 25, 2010, Tyma, J.) [49 Conn. L. Rptr. 557].

Plaintiff has not cited nor alluded to Gen.Stat. § 52–402 et seq. authorizing the court to appoint "three disinterested persons to take the account." She has not cited any of the accounting statutes in Chapter 907. It appears that the plaintiff's request for relief is an accounting of a more informal nature. The court finds that the plaintiff was not permitted access to the books and records of the LLC after demand. This lack of access was further exacerbated by the fact that the parties were engaging in a hotly contested lengthy Florida dissolution of marriage. The defendant, John V. Valluzzo, breached his fiduciary duty to the plaintiff by not permitting access to the LLC's books and records. The other members of the LLC, the three children of John V. Valluzzo were not parties in that marital dispute. The plaintiff has proven that she alone has been "injured" by her lack of access to the LLC's books and records and thus has standing to sue for an accounting. *Newlands v. NRT Associates, LLC,* Superior Court, judicial district of Fairfield at Bridgeport, Docket Number CV 08–4027098 S (March 25, 2010, Tyma, J.), reference. The court incorporates by reference the findings, law and legal conclusions contained in its Memorandum of Decision Re: Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction dated August 21, 2010 (# 253.00) of even date herewith.

***18** The court finds that the business of the LLC is a small enterprise. There are two pieces of real property that share a common access and shared parking lot. The first at 127 Park Avenue, Danbury, Connecticut is improved by a one-story restaurant that makes twelve payments of rent per year. The landlord's expenses for managing the restaurant property are minimal, involving two real estate tax payments per year, insurance, repairs, utilities, and maintenance. There was no evidence of any extraordinary expenses incurred by the landlord for the restaurant property. That fact is supported by the LLC's income tax returns in evidence. The second at 125 Park Avenue, Danbury, Connecticut is improved by a two-story building occupied by MMSNE. The museum is exempt from real estate taxes. MMSNE currently pays no rent and pays for its utilities. The landlord's expenses for 125 Park Avenue are minimal. Ex. 5. It appears that the total bank deposits made by the LLC annually for both properties would be less than two per month. The checks written by the landlord for both properties would be a few dozen per year. The court finds that it would not be an onerous endeavor for the LLC to provide access to various books and records of the LLC and their supporting documents. There was no evidence that providing access to the LLC's books and records and their supporting documents would be burdensome or expensive to the LLC, the two individual parties, nor the three members of the LLC that are not part of this litigation. "Statutes providing for inspection by shareholders should be liberally construed in favor of the shareholders." *Pagett v. Westport Precision, Inc.,* 82 Conn.App. 526, 531 (2004).

The court finds that the plaintiff, by requesting an accounting in her Claim for Relief 2, did not intend to request a formal accounting as set forth by Gen.Stat. § 52–401, et seq. That statute is a codification of the common-law right of an accounting. *Zuch v. Connecticut Bank & Trust Co.,* 5 Conn.App. 457, 460–61 (1985). These statutes primarily consider the procedures to be followed after a trial court has determined that an accounting is due. The Superior Court has the general equitable authority to enter orders for inspection of records and inventory of assets. *Episcopal Church in the Diocese of Connecticut v. Gauss,* 302 Conn. 408, 453 (2011). In addition the statute provides: "In any judgment or decree for an accounting, the court shall determine the terms and principles upon which such accounting shall be held." Gen.Stat. § 52–401. The court will enter an order based on the court's equitable authority. *Celentano v. The Oaks Condominium, Association,* Superior Court, judicial district of Waterbury at Waterbury Complex Civil Litigation, Docket Number X01 CV 94 0159297 S (January 11, 2001, Hodgson, J.); *Rosetti v. Amenta,* Superior Court, judicial district of Hartford–New Britain at Hartford, Docket Number CV 95–0705787 S (August 8, 1997, Satter, J.).

***19** The court finds the issues for the plaintiff on Claim for Relief 2.

The court now considers each of the six Special Defenses filed by the two defendants.

Before dealing with each of the six Special Defenses, a discussion of the Florida matrimonial litigation is necessary. The first two Special Defenses are based on the Florida dissolution of marriage action commenced March 10, 2006. (# 143.00).

Only a small portion of the filings in the Florida dissolution marriage action was presented to this court. The trial record of the Florida dissolution of marriage action was nothing less than massive. The case is entitled "Cynthia Kasper Petitioner/Wife and John Valluzzo Respondent/Husband." Docket Number DR 06–2932 FC, Family Division, Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. Both parties were represented by counsel. The dissolution was tried to a conclusion with trial dates of May 27, May 29 and June 2, 2008 before the Hon. Catherine M. Brunson, Circuit Court Judge. Additional evidence was permitted on the husband's motion, which evidentiary hearing took place on August 18, 2008.

The parties appeared before the Florida court for a status conference hearing on November 19, 2008. A copy of the transcript of that status conference hearing before the Hon. Catherine M. Brunson is marked as an exhibit in this case. Ex. 94. Another status conference occurred on January 26, 2009. There was no documentation of this status conference. The November 19, 2008 status conference was the Florida trial court's attempt to obtain the assistance of both counsel in preparing an equitable distribution schedule pursuant to Florida matrimonial procedures. At the beginning of the status conference the court stated: "So I'm hoping if I give you what my rulings are going to be that you'll be able to, working together with your experts, prepare a schedule to be attached to the final judgment once it's completed." Judge Brunson then proceeded to find: "I've concluded that the non-marital assets for the Wife are the assets that she brought into the marriage." The court then found that "the Wife is entitled to those assets." "I've also concluded that the Wife's interest in G & J Partners and Valluzzo Realty were in fact a gift and that is non-marital." Judge Brunson then stated: "For the Husband I've concluded that G & J Partners is also non-marital. Valluzzo Realty is non-marital. The gifts that he received from his father, likewise, are non-marital. The note from the sale of DCG is also a non-marital asset for him." The court continued to outline the various property orders concerning wine collections, books, antiques, the Palm Beach, Florida house, the New Canaan, Connecticut house, liabilities, periodic alimony and other matters. The husband's attorney then inquired of the Judge Brunson: "What happened to the interest in the partnerships because we've asked for injunctive relief?" The court stated its findings: "I'm denying the requests for injunctive relief and allowing her to continue to proceed in Connecticut if that's what she chooses to do and you-all have not resolved it." The husband's attorney also inquired: "Oh, valuations of the entities, Valluzzo Realty Associates, LLC and G & J Partnerships." The court states: "Mr. Briscoe's finding on the valuations of her interest and the date of the valuation for all of this would be the first day of trial, May 27, 2008." This question by John V. Valluzzo's Florida trial lawyer is a judicial admission that the two business entities at issue were Valluzzo Realty Associates, LLC & G & J Partners. The entire status conference took five minutes and it concluded after that last comment.

***20** On January 30, 2009 the court signed the Amended Final Judgment for Dissolution of Marriage in Case No. DR 06–2932 FC, a fifteen-page document. Ex. 95. The first seven pages are numbered in consecutive order with Judge Brunson's signature at the bottom of page six. Page seven consists of the names and addresses of the two attorneys of record. An additional eight pages are attached and they list various assets. Each page has a number of columns listing asset description, dates, dollar amounts, etc. These eight pages are respectively entitled: "Cash Balance Summary Page Two," "Brokerage Account Summary," "Closely Held Investment Summary," "Retirement Account Summary," "Real Property Summary," "Life Insurance Summary," "Note Receivable Summary" and "Credit Card Summary." These eight pages of summaries are the "equitable distribution schedule" prepared by counsel as requested by Judge Brunson at the November 19, 2008 status conference. These eight pages are part of the Amended Final Judgment for Dissolution of Marriage signed by Judge Brunson on January 30, 2009. The fifteen-page Amended Final Judgment for Dissolution of Marriage contains on the first page a recording number executed by the Clerk and Comptroller for Palm Beach County and the last page contains a certification of the true and attested copy of the document dated May 14, 2009 signed by the Clerk of Circuit Court Palm Beach County, Florida.

The first seven pages of the Amended Final Judgment for Dissolution of Marriage contains seventeen numbered paragraphs, which outline various claims made by the parties and the factual and legal findings made by Judge Brunson. Pages five and six contains sixteen lettered paragraphs, A through R, which are the orders of the court. Ex. 95. The Amended Final Judgment for Dissolution of Marriage contains information concerning the Connecticut investment real property, the entities that own that Connecticut real property and the prosecution of the two Connecticut lawsuits related to these entities. Three Connecticut lawsuits that were pending during the time of the May and June 2008 trial, were

disclosed to the Florida trial court and known to the Florida trial court.

Paragraph 10 of the findings states: "The evidence was undisputed that the Husband's father transferred a 25% interest in G & J Partners, LLC, and a 15% interest in Valluzzo Realty Associates, LLP, as a gift to the Wife. The Husband asserts that these gifts are marital and subject to equitable distribution. However, § 61.075(5)(b)(2) Florida Statutes, excludes noninterspousal gifts as marital assets. Hence, the gifts are not subject to equitable distribution and will remain the Wife's separate property. The husband shall make shareholder distributions as required." This court consulted the current version of the Florida statutes and found that non-marital language for noninterspousal gifts is referenced as follows: "Assets acquired separately by either party noninterspousal gift, bequest, devise or descent and assets acquired in exchange for such assets." § 61.075(6)(b)(2) Fla. Stat. Paragraph 14(a) of the findings states: "The Husband spent considerable money during the marriage on his hobby renovating and making purchases for the Military Museum of Southern New England located in Danbury, Connecticut." Paragraph 15 of the findings states: "The Husband asserted a claim for injunctive relief to preclude the Wife from litigating two independent lawsuits in Connecticut against Connecticut corporations in which both parties have interests. The Husband filed a motion to stay that litigation based upon the pending dissolution of marriage action. The Connecticut Court denied the Husband's motion to stay. The Husband has failed to present sufficient evidence to support the issuance of an injunction in this case. Hence, the request for injunctive relief is denied."

***21** The court finds from an examination of Connecticut court records that there were three lawsuits that had been commenced by Cynthia Kasper. The first is the instant LLC lawsuit against John V. Valluzzo and Valluzzo Realty Associates, LLC, Docket Number FST CV 07–5004383 S returnable to the judicial district of Stamford/Norwalk at Stamford on July 10, 2007. The second is the companion partnership lawsuit entitled *Cynthia Kasper v. G & J Partnership and John V. Valluzzo* returnable to the Superior Court, judicial district of Stamford/Norwalk at Stamford on September 28, 2007 Docket Number FST CV 07–5004956 S. The third is a lawsuit entitled *Cynthia Kasper v. Military Museum of Southern New England, Inc.* returnable to the Superior Court, judicial district of Danbury at Danbury on June 12, 2007, Docket Number DBD CV 07–5002656 S.

At the time of the Florida dissolution trial these three lawsuits were pending in Connecticut. The MMSNE lawsuit, the third named lawsuit, was the subject of the January 30, 2009 order of the Florida dissolution court as follows: "The distribution of the Military Museum of Southern New England Note in the amount of $161,692.00 including interest (through March 31, 2008) shall be awarded to the Husband thereby eliminating the Wife's claim of dissipations as to the museum only. The Wife shall withdraw the action filed against the museum in the State of Connecticut." Ex. 95, paragraph C. That MMSNE lawsuit Docket Number DBD CV 07–5002656 S, was withdrawn by Cynthia Kasper on November 30, 2009 in pleading # 111.00. That left the two Connecticut lawsuits pending; the two that were tried before this court.

The Florida court specifically ordered that the plaintiff may continue the other two pending civil claims in Connecticut. "I'm denying the requests for injunctive relief and allowing her to continue to proceed in Connecticut if that's what she chooses to do and you-all have not resolved it." Ex. 94. "Hence, the request for injunctive relief is denied." Ex. 95. Paragraph H. This ruling is consistent with Connecticut law that permits litigation between former spouses over a jointly held asset. *169 Olive Street, LLC v. D'Urso,* Superior Court, judicial district of New Haven at New Haven, Docket Number CV 09–5029796 S (July 23, 2010, Wilson, J.) [50 Conn. L. Rptr. 394].

In the lettered order section of the Amended Final Judgment for Dissolution of Marriage the Florida court entered the following orders: "D. The Wife is awarded as her non-marital property, the gift of the 25% shareholder interest in G & J Partners LLC and the 15% shareholder interest in Valluzzo Realty Associates LLC. The Wife shall continue to be a partner in both businesses." "E. The Husband is awarded, as his non-marital property, all of his interest in G & J Partners LLC and Valluzzo Realty LLC." "H. The Husband's request for an injunction prohibiting the Wife from pursuing her causes of action in the Connecticut Courts is denied." and "R. The Court retains jurisdiction of this action and the parties for the purpose of entering further orders as may be necessary."

***22** As of the filing of the February 18, 2010 First Special Defense and Second Special Defense (# 143.00) relating to the Florida dissolution action, the defendant, John V. Valluzzo, knew of the January 30, 2009 findings and orders of the Florida court. Based upon representations made by the parties in open court, both parties have filed appeals and

crossappeals from the January 30, 2009 Florida judgment, which appeals are currently pending.

Certain of the Florida dissolution papers were attached to certain pleadings in the LLC and partnership cases. During this trial this court discussed the accuracy of the entity description in the Florida dissolution judgment. Apparently that discussion pointed out to the parties for the first time the inconsistent descriptions for the various partnership and LLC entities concerning the Danbury, Connecticut real property in the Florida Amended Final Judgment for Dissolution of Marriage and in documents filed in the trial before this court. As a result both parties filed motions in the Florida trial and Appellate Courts to address these inconsistencies. This court insisted that title searches be furnished in evidence in this trial so that accurate title information for all real properties be before this court. The parties have offered in evidence before this court maps, deeds, easements and three separate title searches for 1 Sugar Hollow Road, Danbury, Connecticut, 125 Park Avenue, Danbury, Connecticut and 127 Park Avenue, Danbury, Connecticut. Exs. 83, 84, and 85. No party has disputed the accuracy of the deeds and other documents furnished pursuant to these three title searches. This court finds that it has sufficient information to determine the correct names of the real estate entities and the title to the parcels of real estate involved in these two lawsuits.

The court finds that the real property at 125 and 127 Park Avenue, Danbury, Connecticut are two adjacent parcels. These two parcels are shown in a survey entitled “Map Prepared for Realty Associates, Danbury, Connecticut” dated September 30, 1987 recorded in the Danbury Land Records as Map # 8758. Ex. 82. Ex. 82 shows that Parcel A is .498 acres with a building. The lot fronts on Park Avenue. Immediately adjacent and to the rear of Parcel A is Parcel B. Parcel B is .87 acres and containing a larger building located somewhat to the rear. Parcel B also fronts on Park Avenue. Parcel A and Parcel B are adjacent to each other on Park Avenue.

On November 30, 1999 125 and 127 Park Avenue, Danbury, Connecticut were owned by George P. Valluzzo, doing business as Realty Associates. On November 30, 1999 George P. Valluzzo d/b/a Realty Associates by a quit-claim deed conveyed all his right, title and interest in Parcel A and Parcel B, the entire property shown on Map 8758, to Valluzzo Realty Associates, LLC, a Connecticut limited liability company. Ex. 79. The title to 125–127 Park Avenue, Danbury, Connecticut has continuously remained in the name of Valluzzo Realty Associates, LLC since November 30, 1999 to the date of trial. Ex. 65, Ex. 66. Valluzzo Realty Associates, LLC was formed and on January 2, 2000 an Operating Agreement was executed by George Valluzzo, John V. Valluzzo, Cynthia Kasper Valluzzo, David Valluzzo, Carla Ann Hurtado and Joan Valluzzo. Ex. 45. Based upon those two documents, the quit-claim deed and the Operating Agreement, the court finds that the proper legal name for the entity that owns 125–127 Park Avenue, Danbury, Connecticut is Valluzzo Realty Associates, LLC and that this LLC has owned the real property at 125–127 Park Avenue, Danbury, Connecticut consistently since November 30, 1999 through the date of this trial and throughout the Florida dissolution action. This finding is consistent with the eight income tax returns filed by the LLC, from 2002 through 2009, all filed in the name of Valluzzo Realty Associates, LLC. Ex 39–44, Ex. 70, 71. This finding is supported by the two title searches in evidence for 125 Park Avenue and 127 Park Avenue. Ex. 84, 85. All of the above documents refer to the LLC by the same name, Valluzzo Realty Associates, LLC.

***23** The court does not have copies of any of the documents or exhibits filed in the Florida dissolution action nor copies of any dissolution financial affidavits which describe those entities. This court has no knowledge if the title search information was presented to the Florida court. In the November 19, 2008 transcript of the Florida status conference, Judge Brunson refers to one entity as “Valluzzo Realty.” “I've also concluded that the Wife's interest in G & J Partners and Valluzzo Realty were in fact a gift and that is non-marital.” “For the Husband I've concluded that G & J Partners is also non-marital. Valluzzo Realty is non-marital.” Ex. 94. The reference to the entity as “Valluzzo Realty” is incomplete and if intended to be a complete description of the entity is in error. The Florida court's reference to “G & J Partners” is correct.

Thereafter the Amended Final Judgment for Dissolution of Marriage was drafted. An error in the description of the LLC entity appears in the paragraph 10 findings. The entity was referred to as “a 15% interest in Valluzzo Realty Associates, LLP as a gift to the wife.” This court has no evidence of any Limited Liability Partnership or LLP. It has heard no evidence and seen no documents concerning any entity known as Valluzzo Realty Associates, LLP. The documents in the Danbury Land Records contain no reference to Valluzzo Realty Associates, LLP. None of the income tax returns reference Valluzzo Realty Associates, LLP. This court concludes that the LLP reference is a typographical error made in the Amended Final Judgment for Dissolution

of Marriage and that the trial judge in paragraph 10 intended to make a finding that "a 15% interest in Valluzzo Realty Associates, LLC, as a gift to the Wife."

The third reference to Valluzzo Realty is indirectly contained in paragraph 15 of the findings: "The Husband asserted a claim for injunctive relief to preclude the Wife from litigating two independent lawsuits in Connecticut against Connecticut corporations in which both parties have interests." There is no evidence that there was any Connecticut corporation in which any party had an interest other than the Military Museum of Southern New England, Inc. There is no evidence that the wife ever had any ownership interest in the Military Museum of Southern New England, Inc. Two entities in which both parties had an interest are those two entities that own real property in Danbury, Connecticut; the partnership and the LLC, neither of which can be classified as a corporation. The Florida trial judge in paragraph 10 makes a finding that Valluzzo Realty is an LLP and in paragraph 15 makes a finding that Valluzzo Realty is a corporation. In fact it is neither. It is a limited liability company. The court finds that the "Connecticut corporations" finding is a typographical error made in the Amended Final Judgment for Dissolution of Marriage and that the trial judge in paragraph 15 intended to make a finding that the instant two lawsuits tried before this court may proceed in Connecticut thus denying the husband's request for an injunction staying these two pending Connecticut lawsuits.

***24** In the Order portion of the Amended Final Judgment for Dissolution of Marriage the trial court entered the following order: "D. The Wife is awarded, as her non-marital property, the gift of the 25% shareholder interest in G & J Partners LLC and the 15% shareholder interest in Valluzzo Realty Associates, LLC. The Wife shall continue to be a partner in both businesses." To some extent this order is correct and to another extent the order is incorrect. The wife is not a partner in the LLC. She is not a shareholder in the LLC. She is a member in the LLC. The trial judge did correctly identify the entity Valluzzo Realty Associates, LLC, in order D. The court finds that "partner in both business" and "shareholder interest" are typographical errors and that the Florida trial court intended to order that the wife is awarded "the 15% membership interest in Valluzzo Realty Associates, LLC" and that "the wife shall continue to be a member in the LLC and a partner in the partnership."

The Florida trial court incorrectly described the partnership entity, as "G & J Partners LLC" This same error occurs in paragraph 10 of the findings. In actual fact G & J is a partnership and not an LLC. This clerical error is also repeated in order E: "The Husband is awarded, as his non-marital property, all of his interest in G & J Partners LLC and Valluzzo Realty LLC." This same typographical error in describing "G & J Partners LLC" in order D was repeated in order E. It may be that the Florida trial court had an unexecuted copy of a document that referred to G and J as an LLC. This court finds that the LLC reference to G & J Partners LLC is a typographical error and the Florida trial court intended to award the parties their respective percentage interests in the partnership that owns the property at 1 Sugar Hollow Road, Danbury, Connecticut.

This court notes that the Florida trial court described "Valluzzo Realty Associates LLC" in order D and described an entity in order E as "Valluzzo Realty LLC." The court finds that the order E is a typographical error and the Florida trial court intended to and actually did award the percentages as stated in Valluzzo Realty Associates, LLC to the husband, despite the misdescription of the LLC in order E. The court finds that there is no "Valluzzo Realty LLC" entity.

The court has found in the companion partnership litigation that the record title owner of 1 Sugar Hollow Road, Danbury, Connecticut is "G & J Partners" and the record title to 1 Sugar Hollow Road has remained in the name of G & J Partners since July 21, 1994 to the date of trial. This is confirmed by the George P. Valluzzo to G & J Partners quit-claim deed dated July 21, 1994, Ex. 75, the title search, Ex. 64, the title insurance policy, Ex. 83, and the Partnership Agreement dated January 1, 1993, Ex. 14. The title insurance policy for the $1,375,842 first mortgage on 1 Sugar Hollow Road issued by First American Title Insurance Company in paragraph 2 states: "The estate or interest referred to herein is at Date of Policy vested in: G and J Partners a/k/a G & J Partners." Ex. 28. The title search revealed that G & J Partners also has as an asset a $255,528 mortgage dated August 21, 1998 on 127 Park Avenue, Danbury, Connecticut that has not been released. "Open End Mortgage and Security Agreement in Volume 1230 Page 102 from George P. Valluzzo to G & J Partners in the amount of $255,528.00 recorded August 21, 1998." Ex. 85. If no payments have been made on that mortgage, the amount due of principal and accrued interest could be $500,000. No further evidence on this $255,528 mortgage was offered.

***25** The only difference between the Partnership Agreement and the quit-claim deed is the use of the word "and" spelled

out separating the letter G and the letter J, whereas the quit-claim deed uses the ampersand separating those two letters. The character ampersand is a symbol for the word "and." It means the same as "and." The word is derived from English and Latin: "and per se and" meaning and, the symbol which by itself is and. Webster's Online Dictionary defines ampersand as "a punctuation mark (&) used to represent conjunction (and)." No Connecticut case discusses the character ampersand. Florida has placed no significance to the use or non-use of the character ampersand. *State of Florida v. Garay et al.*, 797 So.2d 591, 592 (2001). This is the same result in New York. "The nominal difference is that the 'old' company used an ampersand (' & ') in its name and the 'new' company used the word 'and' spelled out." *State of New York v. New York Movers Tariff Bureau, Inc. et al.*, 48 Misc.2d 225, 269, fn.7 (1965). This court finds that the interchanging use of "and" spelled out and the character ampersand (&) is a distinction without a difference. Both can be used interchangeably. The court finds that the name of the partnership remains the same whether it is denoted as "G & J Partners" or "G and J Partners."

The court finds that the correct name of the partnership is "G & J Partners a/k/a G and J Partners." The lawyer who prepared the financing documents for the current first mortgage on the partnership owned real estate at 1 Sugar Hollow Road, Danbury, Connecticut used the correct name of the partnership. John V. Valluzzo signed these documents designating "G & J Partners a/k/a G and J Partners" as the correct name as the duly authorized partner: loan commitment, Ex. 8; $1,375,842 mortgage note, Ex. 23; Allonge, Ex. 24, Individual Guarantee, Ex. 27 and the Title Insurance Policy, Ex. 28. These documents all use the correct name of the partnership: "G & J Partners a/k/a G and J Partners."

The court now turns to the eight-page "equitable distribution schedule" prepared by the attorneys to the page entitled: "Closely Held Investment Summary." On the column entitled "Investments," the first entity is described as "G & J Partners." The court finds that this is the correct description of the entity that owns 1 Sugar Hollow Road, Danbury, Connecticut. G & J Partners is in conformity with the deed, Ex. 75, and the Partnership Agreement, Ex. 14. The word "and" spelled out and the ampersand are the same word. "G & J Partners" appears twice in the "equitable dissolution schedule;" the first listed at a 25% interest for Cynthia Kasper and the second listed at a 51% interest for John V. Valluzzo. These are the correct percentage partnership interests in "G & J Partners" for both individual parties. The third listed investment is entitled; "Valluzzo Realty Assoc LLC." Due to the narrowness of the column space on this page, this court is not standing on ceremony and concludes that the word "Assoc" is "Associates" spelled out. Due to insufficient line space the common abbreviation of "Assoc" is used. The elimination of a comma before LLC and the lack of a period after Assoc is of no significance and does not misdescribe the LLC entity. This court finds that the description in the "Closely Held Investment Summary" page is an accurate description of the LLC entity with its full name and its proper description as an LLC. The percentage in the third listed investment is John V. Valluzzo's 55% membership share in the LLC. The fourth listed investment is Cynthia Kasper's 15% membership share in the LLC. These two are the correct percentages membership interests in Valluzzo Realty Associates, LLC for both individual parties. The court finds that the "equitable distribution schedule" portion of the Amended Final Judgment for Dissolution of Marriage accurately describes the nature of both entities, the percentage ownership of both entities and the correct name of each entity as found in the recorded deeds, the Partnership Agreement and the Operating Agreement.

***26** The court notes that the G & J Partners Partnership Agreement dated January 1, 1993 was located during this trial in the files of Cohen & Wolf, a Bridgeport, Connecticut law firm, and offered in evidence. Ex. 14. Ex. 14 was not available to be offered at the Florida trial and this was not known to the trial judge. This could explain one or more of the typographical errors. In any event the record title to 1 Sugar Hollow Road, Danbury, Connecticut since 1994 has been in the name of "G & J Partners." This court has no knowledge whether any deeds for any of the Danbury, Connecticut real estate were in evidence in the Florida dissolution action.

Despite these typographical errors, the Amended Final Judgment for Dissolution of Marriage can be rightly understood, when the Florida typographical errors are corrected. They will be consistent with the following findings by this court.

This court makes the following findings: (1) Cynthia Valluzzo owns a 15% membership interest in Valluzzo Realty Associates, LLC; (2) The Florida trial court declared that 15% to be non-marital property; (3) Cynthia Valluzzo owns a 25% partnership interest in G & J Partners a/k/a G and J Partners; (4) The Florida trial court declared that 25% to be non-marital property; (5) John V. Valluzzo owns a 55% membership

interest in Valluzzo Realty Associates, LLC; (6) The Florida trial court declared that 55% to be non-marital property; (7) John V. Valluzzo owns a 51% interest in G & J Partners a/k/a G and J Partners; (8) The Florida trial court declared that 51% to be non-marital property; (9) Cynthia Kasper's 15% membership interest in Valluzzo Realty Associates, Inc. came from a gift to her; (10) Cynthia Kasper 25% partnership interest in G & J Partners a/k/a G and J Partners came from a gift to her; (11) Cynthia Kasper has no further claim against MMSNE; (12) Cynthia Kasper must withdraw the lawsuit filed by her against MMSNE in the Superior Court in the State of Connecticut; (13) Cynthia Kasper is permitted to continue to litigate her claims against John V. Valluzzo and Valluzzo Realty Associates, LLC in this instant lawsuit; (14) Cynthia Kasper is permitted to litigate her claims against John V. Valluzzo and G & J Partners a/k/a G and J Partners in the companion lawsuit; (15) The Florida injunction preventing Cynthia Kasper from continuing the two above Connecticut lawsuits is terminated effective January 30, 2009; (16) G & J Partners is also known as G and J Partners; (17) G & J Partners a/k/a G and J Partners has been the record title owner of 1 Sugar Hollow Road, Danbury, Connecticut since July 21, 1994 to the date of trial; (18) Valluzzo Realty Associates, LLC has been the record title owner of 125–127 Park Avenue, Danbury, Connecticut since November 30, 1999 to the date of trial; (19) G & J Partners, G and J Partners and G & J Partners a/k/a G and J Partners are all the same entity and can be used interchangeably.

The First Special Defense is in three paragraphs and states: "1. The Plaintiff in the above entitled action filed an action for dissolution of marriage against the Defendant, JOHN V. VALLUZZO, on or about March 10, 2006 in the Circuit Court of 15th Judicial Circuit in and for Palm Beach County, Florida. 2. Pursuant to that proceeding, the Plaintiff's ownership interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC., is disputed. 3. If it is found, in the Florida matrimonial proceeding, that the Plaintiff has no viable legal interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC, then she has no standing to make the claims contained in the Complaint."

***27** The First Special Defense is conditional by stating: "If it is found, in the Florida matrimonial proceeding, that the Plaintiff has no viable legal interest in the Defendant VALLUZZO REALTY ASSOCIATES, LLC, then she has no standing to make the claims contained in the Complaint." The Florida trial court has found that Cynthia Kasper has a 15% membership interest in Valluzzo Realty Associates, LLC and that she is permitted to continue to litigate this Connecticut lawsuit for monetary damages and other claims for relief. Ex. 94, Ex. 95. This court has, independent of the Florida dissolution decision, found that Cynthia Kasper has a 15% membership interest in Valluzzo Realty Associates, LLC.

The court finds the issues on the First Special Defense for the plaintiff, Cynthia Kasper.

The Second Special Defense is also related to the Florida dissolution action. It is in three paragraphs as follows: "1. The Plaintiff in the above entitled action filed an action for dissolution of marriage against the Defendant, JOHN V. VALLUZZO, on or about March 10, 2006 in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida. 2. Pursuant to that proceeding, the Plaintiff's ownership interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC is disputed. 3. It is impossible to determine damages, if any, to the Plaintiff, as long as her ownership interest in the Defendant, VALLUZZO REALTY ASSOCIATES, LLC is under dispute." By this Second Special Defense the two defendants are claiming that the typographical errors were not typographical errors by the Florida trial judge and in fact were an award of interest in various entities that do not exist. The two individual parties were in dispute over two legal entities in the Florida dissolution of marriage action; one entity that owned 1 Sugar Hollow Road, Danbury, Connecticut and the second entity that owned 125–127 Park Avenue, Danbury, Connecticut. Both real properties had substantial value and were improved with buildings occupied by rent paying tenants. This court heard no testimony nor read any documents that related to the following entities; G & J Partners, LLC, Valluzzo Realty Associates LLP, Valluzzo Realty LLC, a corporation containing the words G & J Partners, a corporation containing the words Valluzzo Realty, or a corporation containing the words Valluzzo Realty Associates. The court heard evidence that the only business entities in dispute in the Florida dissolution of marriage action owned real property in Danbury, Connecticut and were the subject of Cynthia Kasper's pending Connecticut lawsuits. Throughout this trial the defendants disputed Cynthia Kasper's ownership interests in both entities.

The defendants are apparently claiming that the Florida trial court awarded Cynthia Kasper a 15% interest in "Valluzzo Realty Associates, LLP," and a 25% interest in "G & J Partners LLC" non-existent entities that have no recorded title or interest in real estate in Danbury, Connecticut. The

defendants are apparently claiming that the parties disputed those facts and litigated day after day after day in the Circuit Court in Palm Beach County over two non-existent entities. If in fact, the defendants are claiming that the plaintiff is bound by the typographical error in finding paragraph 10 awarding her a 15% interest in "Valluzzo Realty Associates, LLP," then the defendants must agree that John V. Valluzzo was awarded in Order paragraph E his interest in "Valluzzo Realty, LLC" and no interest in Valluzzo Realty Associates, LLC. So too he was awarded in Order paragraph E his interest in "G & J Partners LLC" and no interest in G & J Partners a/k/a G and J Partners. Following the defendants' logic if the Florida typographical errors are not corrected and the literal reading becomes the Florida court order, John V. Valluzzo was awarded whatever interest he had in two entities that probably do not exist and no interest in entities that own valuable income producing real estate in Danbury, Connecticut. Taking the Florida orders literally, there is a missing 51% interest in Valluzzo Realty Associates, LLC and a missing 55% interest in G & J Partners a/k/a G and J Partners. These missing shares of 51% and 55% are up in the air. Maybe this Connecticut court should invite the parties to open the evidence in this trial so this court can consider dividing up that missing 51% among the LLC members other than John V. Valluzzo and the missing 55% among the partnership partners other than John V. Valluzzo. The defendants' literal reading of the Florida trial court orders can be given no weight. This court has litigated Cynthia Kasper's interest in these two entities and has independently concluded that she is the owner of 15% membership interest in Valluzzo Realty Associates, Inc. and she is the owner of a 25% partnership interest in G & J Partners a/k/a G and J Partners. The court finds that the plaintiff's ownerships interests are no longer in dispute.

***28** The court finds the issues on the Second Special Defense for the plaintiff, Cynthia Kasper.

The Third Special Defense states: "As to Plaintiff's First, Second and Fourth Counts the Plaintiff's claim is barred by the statute of limitations as set forth in § 52–577 of the Connecticut General Statutes." That statute of limitations states: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." Gen.Stat. § 52–577. This statute is commonly known as the general tort statute of limitations. The Third Special Defense although citing statutory authority fails to set forth the underlying facts supporting the claim. The failure to set forth facts in a special defense is fatal. *Fidelity Bank v. Krenisky*, 72 Conn.App. 700, 705, cert. denied, 262 Conn. 915 (2002); *Morneau v. State*, Superior Court, judicial district of New Britain of New Britain, Docket Number HHB CV 09–5013995 S (October 24, 2011, Pittman, J.).

The Second Count seeks an accounting and inspection of books and records. An accounting is not a tort. Inspection of books and records is not a tort. An accounting of real estate is subject to its own statutes of limitation for disputes of co-owner of real estate. Gen.Stat. § 52–580. That statute has not been plead. P.B. § 10–3(a). Thus Gen.Stat. § 52–580 cannot be considered by this court.

The Fourth Count alleges a breach of statutory duty. Gen.Stat. § 34–141 states: "A member or manager shall discharge his duties under section 34–140 and the operating agreement, in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in a manner he reasonably believes to be the best interests of the limited liability company, and shall not liable for any action taken as a member or manager, or any failure to take such action, if he performs such duties in compliance with the provisions of this section." A violation of Gen.Stat. § 34–141 requires a breach of the Operating Agreement and thus contains elements of a breach of contract. The defendants have not pled the two breach of contract statutes of limitation, Gen.Stat. §§ 52–576, 52–581. The statutory violation also applies the standard of care of "an ordinary person in a like position would exercise under similar circumstances." This contains elements of a negligence claim. The negligence statute of limitations is Gen.Stat. § 52–584, not the general tort statute of limitations of Gen.Stat. § 52–577. The defendants have furnished no legal authority that a member or manager's breach of his duty under Gen.Stat. § 34–141 is covered by the general tort statute of limitations.

The First Count alleges a breach of fiduciary duty. A claim of breach of fiduciary duty has been classified as a general tort. *Ahern v. Kappalumakkel, supra*, 97 Conn.App. at 192. "Breach of fiduciary duty is a tort action governed by the three year statute of limitations contained within General Statutes § 52–577." *Id.*, at 192, fn.3. Although Gen.Stat. § 52–577, the general tort statute of limitations, is applicable to breach of a fiduciary duty claim and the statute number has been pled, the failure to state independent facts in Third Special Defense is fatal to the Special Defense. *Fidelity Bank v. Krenisky, supra*, 72 Conn.App. at 705.

***29** Regardless of that dispositive finding, the court will discuss the applicability of the Statute of Limitations to the plaintiff's breach of fiduciary duty claim. In essence the plaintiff's lawsuit claims that John V. Valluzzo, as the LLC manager, failed to furnish to the plaintiff cash distributions of her 15% membership interest in the LLC. Whether or not the plaintiff owned a 15% membership interest in the LLC was hotly disputed in the Florida contested dissolution of marriage action. That issue was not resolved until January 30, 2009, when the Florida trial court entered the following order: "The Wife is awarded, as her non-marital property, the gift of ... the 15% shareholder interest in Valluzzo Realty Associates LLC." Ex. 95, Order D. This lawsuit was commenced on June 7, 2007, after the Florida dissolution of marriage action was filed, but well before the January 30, 2009 Florida dissolution judgment. In addition the plaintiff's 15% membership interest in the LLC was hotly contested throughout twenty-six of the twenty-seven days of this trial. The defendants again and again asserted that the plaintiff had no ownership or membership interest in the LLC. The court finds that the plaintiff's 15% membership interest in the LLC was confirmed by the Florida dissolution decree. Ex. 95. This court further finds, from facts independent of the Florida Amended Final Judgment for Dissolution of Marriage, that the plaintiff owns a 15% membership interest in the LLC from its January 2, 2000 inception and to trial. The plaintiff would not have been able to properly commence or later maintain this lawsuit until her ownership interests in the LLC was established. The court finds that Gen.Stat. § 52–577 does not bar this lawsuit for breach of fiduciary duty since this lawsuit was commenced in June 2007 prior to the finding by either the Florida or Connecticut court confirming the plaintiff's 15% membership interest in Valluzzo Realty Associates, LLC.

For all the reasons stated, the court finds the issues on the Third Special Defense for the plaintiff, Cynthia Kasper.

The Fourth Special Defense states: "As to Plaintiff's Third Count, there is no valid contract between the parties due to the lack of consideration." The contract that the plaintiff has pled in the First Count of the complaint, has been incorporated in the Third Count for breach of contract. It is the January 2, 2000 LLC Operating Agreement. Ex. 45. The Operating Agreement created Valluzzo Realty Associates, LLC and was executed by each of the six named members including the two individual parties in this litigation. The joint signature of each member contained in that Operating Agreement, the mutual promises arising thereof and issuance of the respective membership interests to each of the six LLC members is sufficient consideration. *Gordon v. Indusco Management Corporation*, 164 Conn. 262, 267–68 (1973); *Fairfield County Bariatrics and Surgical Associates, PC v. Ehrlich*, Superior Court, judicial district of Fairfield at Bridgeport, Docket Number FBT CV 10–50291046 S (March 8, 2010, Levin, J.). The court finds that there is valid consideration for the Operating Agreement. The plaintiff is entitled to enforce the Operating Agreement as against the two named defendants.

***30** The court finds the issues on the Fourth Special Defense for the plaintiff, Cynthia Kasper.

The Fifth Special Defense states: "If the acts as alleged in Plaintiff's complaint did occur, the Plaintiff ratified those acts." The defendants are claiming that the plaintiff's ratification occurred twice: (1) by Cynthia Kasper not disagreeing with the payment of the management fees to John V. Valluzzo by the LLC, and (2) by her acceptance of cash distributions without any objection. The defendants did not pursue any defenses of waiver or estoppel, just ratification as contained in the Fifth Special Defense. Since there was no evidence that the plaintiff ever received a cash distribution from the LLC, the second ratification claim has no basis in the evidence. The management fees were not listed in Cynthia Kasper's K–1s. The LLC tax returns did show management fees. She did not receive complete income tax returns that showed the management fees until this litigation commenced. She had no opportunity to verify that any LLC management fee was taken by John V. Valluzzo until this lawsuit was instituted. All through this litigation John V. Valluzzo contested her ownership of a 15% membership interest in Valluzzo Realty Associates, LLC.

"Ratification is defined as the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account.... Ratification requires acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances." *Russell v. Dean Witter Reynolds, Inc.*, 200 Conn. 172, 185 (1986). The court finds that the defendants have failed to prove the elements of ratification.

The issues on the Fifth Special Defense are found for the plaintiff, Cynthia Kasper.

The Sixth Special Defense states: "The plaintiff fails to state a cause of action upon which injunctive relief may be granted." The plaintiff is requesting injunctive relief to

prevent charitable contributions to be made by Valluzzo Realty Associates, LLC to MMSNE. The court has already rejected the plaintiff's injunctive relief on the grounds of failing to plead the necessary elements, failing to prove the necessary elements of injunctive relief and failing to submit a verified complaint. There is no need for the court to rule on the Sixth Special Defense since these issues have already been found in favor of the defendants.

Not as a special defense, but filed in a separate Motion to Dismiss for Lack of Subject Matter Jurisdiction dated August 21, 2010 (# 253.00), the defendants claim that the plaintiff lacks standing to bring this lawsuit in her individual capacity. The court has issued a Memorandum of Decision on that Motion to Dismiss of even date herewith. The general rules relating to shareholders derivative lawsuits in a stock corporation are applicable to a LLC. *Wasko v. Farley, supra,* 108 Conn.App. at 170. "In order for a shareholder to bring a direct or personal action against the corporation or other shareholders, that shareholder must show an injury that is separate and distinct from that suffered by any other shareholder or by the corporation ... A shareholder—even the sole shareholder—does not have standing to assert a claim alleging wrongs to the corporation." *May v. Coffey,* 291 Conn. 106, 115 (2009).

***31** Throughout the trial of this case, this court advised the plaintiff in open court that the defendants would move to dismiss the plaintiff's monetary damage claims unless the plaintiff can show that she suffered these monetary losses in a manner distinct, separate and apart from those sustained by the LLC or any of the other members. The four monetary damage claims are: (1) inappropriate charitable deductions, (2) management fees charged in violation of the Operating Agreement and without a vote of the members, (3) restaurant rent received by the LLC but not distributed for ten years, and (4) use and occupancy not being received from the Military Museum of Southern New England, Inc. for a period of ten years. Cynthia Kasper has totaled those monetary damage claims and took 15% thereof for her monetary claim. Just by doing those calculations the plaintiff has conceded that these four monetary claims would be equally suffered by the other LLC members in their respective percentage ownership. Thus the three children of John V. Valluzzo would be entitled to a 10% distribution of those monetary damage claims if they brought an individual action and John V. Valluzzo himself would be entitled to a 55% monetary damage claim against the LLC. The court has examined in detail each of the supporting documents in regard to the monetary claims, has examined each of the factual circumstances and finds each of the four monetary claims are more attributable to a derivative suit. The plaintiff judicially admitted that fact by alleging in paragraph 21 of her June 7, 2007 complaint: "The actions of defendant John V. Valluzzo, as member and manager of Valluzzo Realty, were detrimental to Valluzzo Realty ..." The court finds that these four monetary claims are not individual damages sustained by Cynthia Kasper separate and apart from any monetary damages sustained by any other four members of the LLC or by the LLC itself. The court therefore finds that the plaintiff has no standing to bring these four monetary damage claims even though this court has found that she has proven both the liability and damage portions of these claims. *Smith v. Snyder,* 267 Conn. 456, 462 (2004).

The court finds that the issues on those four monetary claims must be found for the defendants. Therefore, the court finds the issues on the First Count, Third Count and Fourth Count for the defendants based on the plaintiff's lack of standing.

The court finds that the accounting and access to the LLC's books and records claims in the Second Count are distinct, separate and apart from either the LLC itself or any of its members. They are damages that have been sustained by Cynthia Kasper alone and by her alone. There is no proof that any other member was deprived of access to the LLC's books and records. The court finds that an order of an equitable accounting and access to the LLC's books and records are distinct damage claims that Cynthia Kasper alone has suffered. This court finds that she has standing to bring an accounting claim and seek an order of access to the LLC's books and records. Based on the balancing of the equities and the fact that an inspection, access and production order may eliminate future litigation between these parties, an accounting and access order is appropriate. Counsel for the defendants admitted that the plaintiff has the right to inspect the books and records of the LLC in oral argument.

***32** The issues on the Second Count are found for the plaintiff, Cynthia Kasper, against both John V. Valluzzo and Valluzzo Realty Associates, LLC.

The court will enter an equitable order requiring access to and copies of the LLC's books and records. The plaintiff has not claimed relief for events prior to the institution of this lawsuit. This equitable order will only address matters on and after January 1, 2010. This court has adjudicated the monetary damage claims for events through December 31, 2009.

The court orders that the defendant, Valluzzo Realty Associates, LLC, and defendant, John V. Valluzzo, individually, as a member and as manager of Valluzzo Realty Associates, LLC, jointly and severally, furnish to the plaintiff, Cynthia Kasper, and/or her designated agents and representatives the following under the following conditions:

1. Access to the books and records of the LLC including but not limited to those contained in the January 2, 2000 Operating Agreement and Gen.Stat. § 34–144 in the manner set forth therein.

2. The provision of a copy of the member's K–1 and the LLC's Federal Form 1065 shall not suffice as full and complete compliance with Order 1.

3. Either party may move for a modification and/or clarification of the above orders. Any such motion shall be specific as to the type and nature of the modification requested and shall be served on the other party in the manner of postjudgment motions.

4. The court shall retain jurisdiction over the implementation and/or modification of these access orders. *Episcopal Church in the Diocese of Connecticut v. Gauss, supra,* 302 Conn. at 454.

5. The above orders are final appealable judgments despite the court's retention of jurisdiction.

The clerk will tax costs against both defendants. A separate order of taxation of costs has entered in the companion partnership lawsuit.

All Citations

Not Reported in A.3d, 2011 WL 8883574

End of Document

2015 WL 7709030
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Litchfield.

Shirley PAPALLO et al.
v.
Ronald D. LeFEBVRE.

No. LLICV135007445S.
|
Nov. 2, 2015.

Attorneys and Law Firms

Brower Charles F. Attorney at Law Ll, Torrington, for Shirley Pappalo.

Opinion

SHAH, J.

***1** The plaintiffs, Shirley Papallo and The Big Dog Entertainment LLC, [1] bring this action against the defendant, Ronald LeFebvre, alleging (1) breach of fiduciary duty to the plaintiff, (2) statutory theft on behalf of the LLC, (3) accounting, and (4) violations of the Connecticut Unfair Trade Practices Act (CUTPA). The plaintiffs seek relief in the form of monetary damages, including treble damages pursuant to General Statutes § 52–564, a decree of accounting pursuant to General Statutes § 52–401 et seq., and attorneys fees.

The matter was tried before the court on September 22, 2015. The court received certain documents into evidence and heard the testimony of the plaintiff, the defendant and the plaintiffs' accounting expert, Diane Libby.

FINDINGS OF FACT

Based on the documents submitted into evidence and the testimony heard at trial, the court makes the following findings of fact:

The plaintiff and the defendant met when they both worked for Associated Spring. They were colleagues and friends at the time they started discussing the purchase of a bar that they planned to jointly own and operate. Around August of 2005, the defendant located a potential property that they both decided to purchase. Due to the defendant's recent bankruptcy filing, the parties were in a poor position to secure a business loan on behalf of the LLC. The plaintiff obtained a home equity loan in the amount of $150,000 in order to purchase the property. The parties planned for the defendant to leave his $70,000 salaried position at Associated Spring to run the bar, since the plaintiff had secured financing. She would join the defendant in running the business once she retired from Associated Spring. The parties formed the LLC as fifty percent members in December of 2005, for the purpose of operating the business. They purchased Central Cafe in May of 2006.

The defendant operated the business solely until February of 2010. The plaintiff was still employed at Associated Spring and did not retire until July 1, 2009. During the time that the defendant managed the business, the plaintiff would occasionally come to the bar to help clean after closing. She was busy working and caring for sick family members. She had limited time to participate actively in the day to day management of the business and left it all to the defendant. The plaintiff's health also interfered with her full involvement with the bar even once she began regularly working at the bar in 2010.

During the three years when the defendant solely operated the business, since the business was just starting out, he took care of everything that the business needed, including cleaning, tending to customers, closing the bar each night, balancing the register, handling the business records of the bar, and various other activities. The defendant had no experience with running a business.

When the plaintiff began working regularly at the bar in February of 2010, she started helping with cleaning and learning how to run the banquets that the bar would host. She also started balancing the cash register at the end of each night. As she began running more of the bar, she noticed certain practices of the bar that she found questionable. She noticed that employees were paid a certain amount of wages in cash and that the cash register balances she determined at the end of each night did not match up with amounts that the defendant reported. The plaintiff also noticed that certain customers were not paying for their orders but running

tabs. The defendant explained that Central Cafe was part of a barter exchange with other businesses so that the bar would allow patrons in the barter exchange to trade services they provided for food and drinks at the bar. The plaintiff never saw the barter exchange agreement or any records related to the agreement. The defendant admittedly used some of the services through the barter exchange for his own personal use and benefit.

***2** By that time, the defendant had hired an accountant, Mr. Giantonio, to handle the business tax filings for the bar. When the plaintiff learned of certain record keeping practices of the bar, she decided to set up a meeting with her personal accountant, Diane Libby, Mr. Giantonio, and the defendant in August of 2010. In reviewing the financials of the bar, Libby said that the expenses were at least five to ten percent higher than industry benchmarks and that the income was underreported. In particular, she expressed concern over the adjustments that were done without any documentation, which was exceptional based on standard accounting practices.

Within months of that meeting, the relationship between the parties deteriorated. At some point in 2011, the plaintiff asked if there were any profits and the defendant still indicated that there were not sufficient profits to generate equal salaries for the both of them. The plaintiff was increasingly concerned, but did not ask for specific documentation from the defendant. In 2012, she started to log the amount she counted in the register each night and compared that number to the amount noted by the defendant the following morning. The defendant was aware of the plaintiff tracking these amounts and raised the matter with her several months later. The defendant admitted that he kept cash in a drawer in the bar's office to pay for daily expenses and some employee wages. The defendant offered to buy out the plaintiff's interest in the bar so he could continue to run it, but the plaintiff believed he was simply trying to push her out so he could continue to run the business without concern for the issues she raised regarding his questionable business practices.

The plaintiff filed this action when the defendant prevented her from entering the bar in June of 2013. The defendant subsequently transferred all of his interest in the limited liability corporation to the plaintiff in August of 2013. The plaintiff is now the sole member of the LLC and the sole owner of Central Cafe.

DISCUSSION

I. Breach of Fiduciary Duty

The first count sets forth a cause of action for breach of fiduciary duty as to the plaintiff only, as an equal member of the LLC.

"It is axiomatic that a party cannot breach a fiduciary duty to another party unless a fiduciary relationship exists between them." *Biller Associates v. Peterken*, 269 Conn. 716, 723, 849 A.2d 847 (2004). "[A] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." (Internal quotation marks omitted.) *Hi–Ho Tower, Inc. v. Com–Tronics, Inc.*, 255 Conn. 20, 38, 761 A.2d 1268 (2000). "The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him ... We have not, however, defined that relationship in precise detail and in such a manner as to exclude new situations, choosing instead to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other ... *Falls Church Group, Ltd. v. Cooper & Alcorn, LLP*, 281 Conn. 84, 108–09, 912 A.2d 1019 (2007)." (Internal quotation marks omitted.) *Calpitano v. Rotundo*, Superior Court, judicial district of New Britain, Docket No. CV–11–6008972–S (August 3, 2011, Swienton, J.) (52 Conn. L. Rptr. 464, 467). Once a fiduciary relationship is found to exist, the burden of proving fair dealing shifts to the fiduciary and must be established by clear and convincing evidence. *Szollosy v. Szollosy*, Superior Court, judicial district of Litchfield, Docket No. CV–12–6006971–S (August 6, 2015, Pickard, J.).

***3** While our appellate courts have not addressed the issue, a number of trial courts have found that " 'like a partner in a partnership, a member of a limited liability company has a fiduciary duty to the other members'; See *Ruotolo v. Ruotolo*, Superior Court, judicial district of New Haven, Docket No. CV–09–5026804–S (December 29, 2009); *Wilcox v. Schmidt*, Superior Court, judicial district of Windham, Docket No. CV–04–4001126–S (June 3, 2010); *Yavarone v. Jim Moroni's Oil Service, LLC*, Superior Court, judicial district of Middlesex, Docket No. CV–03–0102318–S (February 18, 2005) ..." *Calpitano v. Rotundo, supra*, 52 Conn. L. Rptr. 467. This court agrees that under certain

circumstances a member of a limited liability company may have a fiduciary duty to other members.

In the present case, the facts establish that the defendant had a fiduciary duty to the plaintiff as a member of the LLC. The plaintiff trusted the defendant with the operation of their business and relied upon him to run it legally. The parties were equal members of the limited liability corporation, but the defendant had sole control over the operation of the business for the first three years. The plaintiff did fairly have an expectation that the defendant would operate the business legally and the defendant breached this trust by operating the business in the manner that he did and continuing to do so once the plaintiff actively participated in the operation and raised her concerns over certain business practices to the defendant. By using an asset of the business, specifically the barter agreement to pay for home heating and dental bills, the defendant clearly misused a business asset for his personal benefit at the expense of the other members and breached the trust that he had as the managing member of the bar. The court finds that the plaintiff has met her burden of establishing a breach of fiduciary duty by the defendant by his use of the barter exchange agreement and awards damages based on the misuse of this asset. The plaintiff presented other evidence of damages but the court does not find that the plaintiff met her burden of proof with respect to those claims. The defendant has failed to establish fair dealing by clear and convincing evidence. Therefore, the court finds for the plaintiff and against the defendant on count one, alleging a breach of fiduciary duty.

II. Statutory Theft

In order to establish a claim for statutory theft, and thus treble damages, a party must prove the same elements as larceny. " 'Statutory theft under § 52–564 is synonymous with larceny under General Statutes § 53a–119 ... Pursuant to § 53a–119, [a] person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or [withholds] such property from an owner ... Conversion can be distinguished from statutory theft as established by § 53a–119 in two ways. First, statutory theft requires an intent to deprive another of his property; second, conversion requires the owner to be harmed by a defendant's conduct. Therefore, statutory theft requires a plaintiff to prove the additional element of intent over and above what he or she must demonstrate to prove conversion.' ... *Howard v. MacDonald*, 270 Conn. 111, 129 n. 8, 851 A.2d 1142 (2004)." *Deming v. Nationwide Mutual Ins. Co.*, 279 Conn. 745, 771, 905 A.2d 623 (2006). "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages." General Statutes § 52–564.

***4** The court finds the evidence presented by the plaintiffs is not sufficient to prove that the defendant had the requisite intent to deprive the LLC of its assets for his own personal appropriation and benefit. The defendant and the plaintiff were partners in a business with the plaintiff leaving almost all of the responsibility for the daily operations of the bar to the defendant. There was no evidence of a written operating agreement, only evidence of a contradictory verbal understanding between the parties. The defendant presented evidence that the understanding of the parties was that he would first be provided a salary from any profits, to the extent there were any, since he was the only one actively involved in the business. The plaintiffs claim that the parties' intent was to share all profits equally, but they do not allege a claim to any profits from the period when the plaintiff was not actively working at the bar. Although clearly improper, the cash that the defendant took was not used for his own benefit, but to pay the employees of the bar and other expenses of the business. He also used the bar's asset, specifically the barter agreement, only when the bar would lose the value of its exchange if it went unused.

The defendant admitted to his lack of business acumen and hired an accountant to ensure that the proper business accounting was kept and taxes were filed. The plaintiffs have not shown the requisite intent on the part of the defendant, and the court finds that the plaintiffs have not sustained their burden of proof to establish statutory theft. Therefore, the court finds for the defendant and against the LLC on count two, alleging statutory theft.

III. Accounting

" 'An action for an accounting calls for the application of equitable principles.' *Travis v. St. John*, 176 Conn. 69, 74, 404 A.2d 885 (1978)." *Mankert v. Elmatco Products, Inc.*, 84 Conn.App. 456, 459, 854 A.2d 766, cert. denied, 271 Conn. 925, 859 A.2d 580 (2004). " 'An 'accounting' is defined as an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due. An action for an accounting usually invokes the equity powers of the court, and the remedy that is most frequently resorted to ... is

by way of a suit in equity.' 1 Am .Jur.2d 609, Accounts and Accounting § 52 (1994). 'An accounting is not available in an action where the amount due is readily ascertainable. Equity will ordinarily take jurisdiction to settle the account if the facts create a reasonable doubt whether adequate relief may be obtained at law.' *Id.*, 610–11, § 54. 'To support an action of accounting, *one* of several conditions must exist. There must be a fiduciary relationship, *or* the existence of a mutual and/or complicated accounts, *or* a need of discovery, *or* some other special ground of equitable jurisdiction such as fraud.' ... *C & S Research Corp. v. Holton Co.*, 36 Conn.Supp. 619, 621, 422 A.2d 331 (1980). 'Courts of equity have original jurisdiction to state and settle accounts, or to compel an accounting, where a fiduciary relationship exists between the parties and the defendant has a duty to render an account. The right to compel an account in equity exists not only in the case of those relationships which are traditionally regarded as those of trust and confidence, but also in those informal relations which exist whenever one person trusts in, and relies upon, another. The relationship between ... parties to a business agreement ... [has] ... been deemed to involve such confidence and trust so as to entitle one of the parties to an accounting in equity.' 1 Am.Jur .2d 612–14, *supra*, § 55; *C & S Research Corp. v. Holton Co., supra*, 36 Conn.Supp. 621." (Emphasis in original.) *Mankert v. Elmatco Products, Inc., supra*, 84 Conn.App. 460–61.

***5** General Statutes § 34–144(d) provides: "Members, if management of the limited liability company is vested in the members, or managers, if management of the limited liability company is vested in managers, shall render, to the extent the circumstances render it just and reasonable, true and full information of all things affecting the members to any member and to the legal representative of any deceased member or of any member under legal disability."

Whether a plaintiff member of an LLC may seek accounting from a defendant member of the LLC individually is dependent upon whether the defendant's failure to provide records to the plaintiff harmed the plaintiff individually or harmed all members of the LLC equally. Compare *Internet Airport Parking, LLC v. Parking Access, LLC*, Superior Court, judicial district of Hartford, Docket No. CV–13–6044395–S (December 5, 2013, Scholl, J.) (57 Conn. L. Rptr. 265) (no standing to bring claim for accounting because no individual harm to plaintiff member of LLC unique from harm to LLC itself) with *Dowd v. Mawhinney*, Superior Court, judicial district of Hartford, Docket No. CV–14–6054044–S (July 30, 2015, Sheridan, J.) [60 Conn. L. Rptr. 675] (distinguishing *Internet Airport Parking* and finding plaintiffs had standing to bring claim for accounting because "failure to provide- or deliberate withholding of financial information, financial reporting and financial statements, despite demands by the plaintiffs" were "sufficient to state a claim for injury suffered by the plaintiffs individually, separate and apart from the LLC itself or any other members of the LLC").

The plaintiffs seek an accounting on behalf of the LLC and the plaintiff individually. This court follows the reasoning of *Internet Airport Parking* and finds that the plaintiff has not suffered any injury distinct from the one suffered by the LLC other than the loss of any value she should have shared in through the barter exchange agreement. Although she suffered as a result of the misuse of the barter agreement, the plaintiff obtained the records related to the agreement and the loss was ascertainable. Thus, the plaintiff does not have standing to pursue an accounting on her own behalf.

The court finds that the plaintiffs have not provided sufficient evidence on behalf of the LLC for the court to order an accounting of Central Cafe's business and financial records for the period from 2010 through 2012. The plaintiffs only had one meeting with their accountant, never asked for documentation from the defendant though they raised questions about operations, and the plaintiff was fully aware of and engaged in some of the complained of practices, specifically the payment of employees in cash. Therefore, the court finds for the defendant and against the plaintiffs on count three, seeking an accounting.

IV. Connecticut Unfair Trade Practices Act

General Statutes § 42–110b(a) provides: "No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."

***6** " 'The operative provisions of [CUTPA], § 42–110b(a), states merely that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Trade or commerce, in turn, is broadly defined as the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, person or mixed, and any other article, commodity, or thing of value in this state ... The purpose of CUTPA is to protect

the public from unfair practices in the conduct of any trade or commerce, and whether a practice is unfair depends upon the findings of a violation of an identifiable public policy ... A CUTPA claim may be brought in the Superior Court by [a]ny person who suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42–110b ...' ... [*Elder Bros., Inc. v. Wine Merchants of Connecticut, Inc.*, 275 Conn. 363, 380, 880 A.2d 138 (2005).]" *Noyes v. Antiques at Pompey Hollow, LLC*, 144 Conn.App. 582, 593–94, 73 A.3d 794 (2013).

" 'It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1)[W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwisein other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons] ... All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.' ... *Hartford Electric Supply Co. v. Allen–Bradley Co.*, 250 Conn. 334, 367–68, 736 A.2d 824 (1999)." *Noyes v. Antiques at Pompey Hollow, LLC, supra*, 144 Conn.App. 594–95.

The plaintiffs have not presented evidence sufficient to support that the defendant's alleged actions fall within the scope of CUTPA. The plaintiffs have presented evidence of negligence, poor judgment, and inexperience. The plaintiffs rely on the evidence presented to support their claim for breach of fiduciary duty, but the evidence presented in this claim is not sufficient to rise to the level of conduct prohibited under CUTPA. Therefore, the court finds for the defendant and against the plaintiffs on count four, alleging violation of CUTPA.

DAMAGES

On the breach of fiduciary duty count, the court orders the defendant to pay to the plaintiff all amounts that were improperly spent solely for his personal benefit. Specifically, the defendant shall pay to the plaintiff the amount of $10,191.25, which represents the amounts misspent on home oil use and dental bills.

CONCLUSION

***7** Judgment shall enter as set forth above.

So ordered.

All Citations

Not Reported in A.3d, 2015 WL 7709030

Footnotes

1 Shirley Papallo and The Big Dog Entertainment LLC will collectively be referred to as the plaintiffs and individually referred to as the plaintiff, for Shirley Papallo, and the LLC, for The Big Dog Entertainment LLC.

1994 WL 685044
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of Fairfield, at Bridgeport.

RUBY'S, INC., et al
v.
POST PUBLISHING COMPANY, et al.

No. CV93 0307192S.
|
Nov. 29, 1994.

MEMORANDUM OF DECISION

RE: MOTION FOR PARTIAL SUMMARY JUDGMENT (# 107)

RODRIGUEZ, Judge.

***1** The plaintiffs, Ruby's, Inc. and Tuesday's Den, Inc., bring this action against the defendants, Post Publishing Company (Post), the owner of the Connecticut Post newspaper and its publisher, Dudley Thomas, to recover for the alleged "bad faith" breach of two advertising contracts. The plaintiffs are both bars which feature adult entertainment in the form of female "exotic" dancers.

The plaintiffs allege that on an unspecified date they entered into advertising contracts with the Post. They further allege that they had a long standing business relationship with the Post and that for many years they received positive results from placing advertisements in the Connecticut Post. The plaintiffs allege that in December of 1992, they renewed their advertising contract with the Post. The plaintiffs further allege that in February of 1993 the defendants terminated the advertising contracts and informed the plaintiffs that they would no longer accept their advertising copy. The plaintiffs allege that the defendants terminated the contracts in response to a lawsuit that was brought against them by an adult video sales establishment whose advertisements were refused by the defendants due to complaints filed with the defendants by members of the community. The plaintiffs further allege that they have sustained economic damages as a result of the defendants' bad faith breach of the advertising contracts. They seek punitive damages from the defendants based on the defendants' alleged "bad faith" breach of the advertising contracts.

On July 13, 1994, the defendant Thomas filed a motion for partial summary judgment (# 107), along with a supporting memorandum of law and an affidavit. On July 27, 1994, the plaintiffs filed a memorandum of law in opposition, and the affidavit of the plaintiffs' owner, Dennis Capozziello.

The plaintiffs allege that the defendant Thomas acted in bad faith in breaching the parties advertising contracts. A claim for bad faith breach of contract gives rise to "a distinct tort claim." *L.F. Pace & Sons, Inc. v. Travelers Co.*, 9 Conn.App. 30, 46 (1986). "Bad faith in general implies both actual or constructive fraud or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.... bad faith means more than mere negligence; it involves a dishonest purpose." *Habetz v. Condon*, 224, 231, 237 (1992).

Since the plaintiffs' claim for bad faith breach of contract does give rise to a cause of action which sounds partially in tort, an agent such as Thomas may be liable for his alleged tortious conduct. Accordingly, the motion for partial summary judgment on the narrow ground that an agent of a disclosed principal cannot be liable for a breach of contract by its principal is denied as a matter of law.

All Citations

Not Reported in A.2d, 1994 WL 685044

2009 WL 5698124
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of New Haven.

Rene RUOTOLO et al.
v.
Ronald RUOTOLO et al.

No. CV095026804.
|
Dec. 29, 2009.

West KeySummary

1 **Damages**
Breach of Contract

An action for breach of contract with a tortious overtone was sufficient to assert a claim for an award of punitive damages. A woman suing her ex-husband in his capacity as her former business partner alleged a specific contractual obligation in which they agreed to share equally in the ownership of all assets and income derived from services provided by their jointly owned company. The sufficient allegations of tortious conduct indicated that the ex-husband had acted maliciously toward his ex-wife with the intention of causing her severe economic loss by shutting her out of their old business and opening a new business in which she was not allowed to be involved.

Cases that cite this headnote

Attorneys and Law Firms

Michael G. Beebe, Branford, for Rene Ruotolo.

Milano & Wanat, Branford, for Ronald Ruotolo.

CLARANCE J. JONES, Judge.

Allegations in the Complaint

***1** On February 13, 2009, the plaintiff, Rene Ruotolo, individually and derivatively on behalf of Ruotolo Heating and Plumbing, LLC, and Ruotolo Realty, LLC, filed a nineteen-count complaint in this action against defendants Ronald Ruotolo and Ruotolo Mechanical, Inc. Seven of those counts are at issue in this motion to strike.

In count one, the plaintiff individually alleges a breach of contract by Ronald Ruotolo. In count two, the plaintiff individually alleges fraud by Ronald Ruotolo. In count five, the plaintiff individually alleges a breach of the implied covenant of good faith and fair dealing by Ronald Ruotolo. In count eight, the plaintiff individually alleges a breach of fiduciary duty by Ronald Ruotolo. In count eleven, the plaintiff derivatively on behalf of Ruotolo Plumbing and Heating, LLC, and Ruotolo Realty, LLC, alleges a violation of General Statutes § 34-141(e) and seeks a trust on the corporate funds and assets that have been misappropriated by Ronald Ruotolo and Ruotolo Mechanical, Inc. In count twelve, the plaintiff derivatively on behalf of Ruotolo Plumbing and Heating, LLC, and Ruotolo Realty, LLC, alleges fraud by Ronald Ruotolo. In count eighteen, the plaintiff derivatively on behalf of Ruotolo Plumbing and Heating, LLC, and Ruotolo Realty, LLC, alleges a breach of fiduciary duty by Ronald Ruotolo.

The plaintiff alleges, *inter alia*, the following facts in support of the above counts. On December 27, 1995, the plaintiff and Ronald Ruotolo formed Ruotolo Plumbing and Heating, LLC (Plumbing), located at 29 Printers Lane in New Haven and owned in equal shares by the plaintiff as member and Ronald Ruotolo as managing member. On December 11, 1996, the plaintiff and Ronald Ruotolo formed Ruotolo Realty, LLC (Realty), located at 29 Printers Lane in New Haven and owned in equal shares by the plaintiff as member and Ronald Ruotolo as managing member. As the owner of the property located at 29 Printers Lane in New Haven, Realty rented the property to Plumbing, and later to the defendant corporation, Ruotolo Mechanical, Inc. Upon the formation of both Plumbing and Realty, the plaintiff and Ronald Ruotolo agreed to share equally ownership of all assets and income derived from all services provided by each business. From their formations until December 29, 2006, both limited liability companies earned substantial income.

The plaintiff also alleges that on December 29, 2006, while Ronald Ruotolo was considering whether to divorce her, he formed defendant corporation Ruotolo Mechanical, Inc. (Mechanical), without informing her. Mechanical thereafter began operations at 29 Printers Lane, taking sole possession of the property without the permission of Plumbing, and took possession of and converted for its use all furniture, fixtures, machinery, equipment vehicles, tools, supplies, inventory, contracts and deposits owned by Plumbing. In addition, she alleges that the defendants diverted, collected and converted the payment of Plumbing's accounts receivable, and took all of Plumbing's records, including, *inter alia*, customer lists, mail, accounts receivable, accounts payable, and all records relating thereto.

***2** The plaintiff further alleges that Ronald Ruotolo has since prevented her from entering the premises at 29 Printers Lane, and has ousted Plumbing from the premises. As a result of the above actions, it is alleged that Plumbing's customers believe that Mechanical is in fact the same business as Plumbing, instead operating under the name Ruotolo Mechanical, Inc. All of these actions were taken without the permission of or compensation to Plumbing. Additionally, the plaintiff alleges that Ronald Ruotolo reduced the rent paid to Realty for the premises at 29 Printers Lane, without her or Realty's knowledge or consent.

The defendants have filed a motion to strike counts one, two, three, four, five, six, eight, eleven, twelve, fifteen, and eighteen on the ground that these counts are legally insufficient. Furthermore, the defendants challenge counts two, three, four, six, seven, nine and nineteen because the plaintiff in her individual capacity does not have standing to bring these claims. The defendants have submitted a memorandum of law in support of the motion.

On September 11, 2009, the plaintiff filed a memorandum of law in opposition, in which she acknowledged that she had not properly stated claims in counts three, four, six, seven, nine and fifteen. The motion was heard at the short calendar on September 21, 2009, where the parties argued the counts still at issue. At oral argument on September 21, 2009, the plaintiff acknowledged that her individual claim in count nineteen can be stricken, but both parties agreed that the claim in count nineteen by the plaintiff derivatively on behalf of Plumbing and Realty may stand. Consequently, the only counts at issue on this motion to strike are counts one, two, five, eight, eleven, twelve and eighteen on the ground that they are legally insufficient, and further as to count two, on the ground that the plaintiff in her individual capacity does not have standing to bring such a claim.

Standard for Motion to Strike

While construed so as to admit all facts well pleaded in the complaint, a Motion to Strike challenges the legal sufficiency of the allegations of any complaint, counterclaim or cross claim, or of any one or more counts thereof, to state a claim upon which relief can be granted. See Practice Book § 10-39(a). See also *RK Constructors, Inc. v. Fusco Corp.*, 231 Conn. 381, 383 n. 2, 650 A.2d 153 (1994). Accordingly, the court must "construe the complaint in the manner most favorable to sustaining its legal sufficiency ... [I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *American Progressive Life & Health Ins. Co. of New York v. Better Benefits, LLC*, 292 Conn. 111, 120, 971 A.2d 17 (2009).

Analysis

I. Count One

In their memorandum of law in support of the motion to strike, the defendants argue that the plaintiff in her complaint fails to allege the existence of a contract between herself and Ronald Ruotolo, and so there is no allegation sufficient to support the claim for breach of contract in count one. Additionally, they argue that the plaintiff's claim for punitive damages must be stricken as punitive damages are generally not recoverable in a breach of contract action, and the plaintiff fails to plead necessary facts to justify an award of punitive damages.

***3** The plaintiff counters by arguing that paragraphs seven and eight of the complaint allege a contract between her and Ronald Ruotolo, thereby satisfying the requirements for both counts one and five, and that paragraph twenty-seven of the complaint alleges acts done with a bad motive sufficient to support an awarding of punitive damages.

A claim in breach of contract consists of certain elements. "The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal

quotation marks omitted.) *Chiulli v. Zola*, 97 Conn.App. 699, 706-07, 905 A.2d 1236 (2006).

In her complaint, the plaintiff alleges in paragraphs seven and eight that upon the formation of both Plumbing and Realty, she and Ronald Ruotolo "agreed to share equally, ownership of all assets and income derived from all services provided by [each limited liability company]." The plaintiff further alleges in paragraphs seventeen and eighteen that upon the formation of Mechanical, the defendants "diverted, collected, and converted payment of [Plumbing's] accounts receivable ... without compensating or obtaining the consent of [Plumbing]" and took possession and converted for their use "substantially all the furniture, fixtures, machinery, equipment, vehicles, tools, supplies, inventory, contracts and deposits ... without compensating [Plumbing] or obtaining the consent of [Plumbing]." As a result of these actions, the plaintiff alleges in paragraphs twenty-five and twenty-six that she "lost income representing one half of all net earnings obtained by [Mechanical] since it was formed" and that she additionally "suffered damages from diminution in value of her fifty percent interest in [Plumbing]."

In the present case, the plaintiff alleges a specific contractual obligation; namely, that she and Ronald Ruotolo agreed to share equally in the ownership of all assets and income derived from all services provided by Plumbing and Realty, and that Ronald Ruotolo failed to meet that obligation when he converted and diverted the property and accounts of Plumbing to Mechanical. See *Commissioner of Labor v. C.J.M. Services, Inc., supra*, 268 Conn. at 293, 842 A.2d 1124. Thus, construing the facts broadly and in the light most favorable to sustaining their legal sufficiency, the court finds that the plaintiff has pleaded a legally sufficient cause of action for breach of contract in count one.

Having established that the plaintiff has properly pleaded a claim for breach of contract, it is necessary to determine whether punitive damages are recoverable in this action. "Punitive damages are not ordinarily recoverable for breach of contract ... This is so because ... punitive or exemplary damages are assessed by way of punishment, and the motivating basis does not usually arise as a result of the ordinary private contract relationship. The few classes of cases in which such damages have been allowed contain elements which bring them within the field of tort. It is, of course, settled law that, in certain cases of tort, punitive or exemplary damages may properly be awarded ... Breach of contract founded on tortious conduct may allow the award of punitive damages. Such tortious conduct must be alleged in terms of wanton and malicious injury, evil motive and violence, for punitive damages may be awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others ... Thus, there must be an underlying tort or tortious conduct alleged and proved to allow punitive damages to be granted on a claim for breach of contract, express or implied. Elements of tort such as wanton or malicious injury or reckless indifference to the interests of others giving a tortious overtone to a breach of contract action justify an award of punitive or exemplary damages. In our jurisdiction such recovery is limited to an amount which will serve to compensate the plaintiff to the extent of his expenses of litigation less taxable costs." (Citations omitted; internal quotation marks omitted.) *L.F. Pace & Sons, Inc. v. Travelers Indemnity Co.*, 9 Conn.App. 30, 47-48, 514 A.2d 766, cert. denied, 201 Conn. 811, 516 A.2d 886 (1986).

***4** In *L.F. Pace & Sons*, the court reasoned that the plaintiff's complaint sufficiently pleaded tortious conduct because it alleged that "the defendant acted outrageously and maliciously toward the plaintiff with wilful disregard for plaintiff's rights under the terms of its implied agreement with the plaintiff, and with the intention of causing it severe economic and financial loss." *Id.*, at 49, 514 A.2d 766. Here, the defendant alleges that Ronald Ruotolo's actions "were done with premeditation, willfully and by design in order to fraudulently deprive the [limited liability company] and [Rene Ruotolo]" and that Ronald Ruotolo "devised a fraudulent scheme to cheat the plaintiff out of her 50% share of the [limited liability company] and all income derived therefrom." As in *L.F. Pace & Sons*, the plaintiff alleges that the defendant acted maliciously toward the plaintiff with the intention of causing her severe economic loss.

Thus, the court finds that the plaintiff has sufficiently pleaded an action for breach of contract with a tortious overtone sufficient to assert a claim for an award of punitive damages.

Accordingly, the court finds that the motion to strike count one should be denied.

II Counts Two and Twelve

As to count two, the defendants argue that the plaintiff "does not have standing to bring a claim in her individual capacity to recover for an [alleged] injury the basis of which is a wrong to

the limited liability company." As to count twelve and in the alternative as to count two, the defendants argue that even if the plaintiff does have standing to bring such a claim, she fails to allege any of the requisite elements of fraud. The plaintiff responds by arguing that she has properly alleged a claim for constructive fraud.

As stated by our Supreme Court "[g]enerally, individual stockholders cannot sue the officers at law for damages on the theory that they are entitled to damages because mismanagement has rendered their stock of less value, since the injury is generally not to the shareholder individually, but to the corporation-to the shareholders collectively." *Yanow v. Teal Industries, Inc.*, 178 Conn. 262, 281, 422 A.2d 311 (1979). However, "where a sole minority stockholder ... is the victim of a fraud perpetrated by the sole controlling stockholder ... the injury, and the action for redress, cannot be said to belong merely to the corporation. If the controlling majority stockholder seeks to injure the minority stockholder through the means of looting the corporation or so wrecking it that the minority stockholder would get nothing out of his assets, the claim resulting therefrom is sufficient to constitute an individual action." *Id.*, at 282 n. 9, 422 A.2d 311.

In the present case, the plaintiff alleges that she is the victim of a fraud perpetrated by the sole managing member of the limited liability company, Ronald Ruotolo, who allegedly sought to injure the sole noncontrolling member by converting all of the limited liability company's assets and accounts to Mechanical, similar to the looting illustration given in *Yanow v. Teal Industries, Inc., supra*, 178 Conn. at 262, 422 A.2d 311. Though Ronald Ruotolo's actions harmed the limited liability company, he allegedly sought to and did harm the plaintiff individually by rendering worthless her interest in Plumbing.

***5** Accordingly, the court finds that the plaintiff has standing to bring a suit for fraud in an individual capacity. Therefore, the motion to dismiss count two should be denied.

Because the plaintiff has standing to bring a claim for fraud against Ronald Ruotolo in count two, and because she has also claimed fraud derivatively on behalf of Plumbing and Realty in count twelve, there remains the issue of whether she has sufficiently pleaded those counts. "The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment." *Mitchell v. Mitchell*, 31 Conn.App. 331, 336, 625 A.2d 828 (1993). However, "[t]he burden of proof and the elements necessary in an action for constructive fraud differ markedly from the prerequisites to liability for actual fraud. The breach of a confidential or special relationship forms the basis for liability under the doctrine of constructive fraud. The plaintiff must establish the existence of a confidential or special relationship ... Once such a relationship is found to exist, the burden shifts to the fiduciary to prove fair dealing by clear and convincing evidence." (Citations omitted.) *Id.*, at 334-35, 625 A.2d 828. "A fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other ... The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him." *Dunham v. Dunham*, 204 Conn. 303, 322, 528 A.2d 1123 (1987). "[L]ike a partner in a partnership, a member of a limited liability company has a fiduciary duty to the other members." *Yavarone v. Jim Moroni's Oil Service, LLC*, Superior Court, judicial district of Middlesex, Docket No. CV 03 0102318 (February 18, 2005, Aurigemma, J .).

As the managing member of both limited liability companies, Ronald Ruotolo had a special relationship with the plaintiff, owing a fiduciary duty to the plaintiff as a fellow member and to the limited liability companies as a whole. That relationship is compounded by the fact that Ronald Ruotolo was married to the plaintiff during the period in which the alleged fraud took place. Because a confidential or special relationship exists between the parties, the plaintiff has sufficiently pleaded claims for constructive fraud by Ronald Ruotolo against the plaintiff individually and against Plumbing and Realty.

Accordingly, the court finds that the motion to strike counts two and twelve should be denied.

III. Count Five

With regard to count five, the defendants argue that the plaintiff's claim for a breach of the implied covenant of good faith and fair dealing is insufficient because the plaintiff fails to allege a contract, and such a breach requires a contract upon which the covenant can be based. The plaintiff counters that she has properly alleged a breach of contract and thus has properly pleaded a breach of the implied covenant of good faith and fair dealing.

***6** "[I]t is axiomatic that the ... duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship ... In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement ... The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term ... To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith ... Bad faith has been defined in our jurisprudence in various ways. Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive ... Bad faith means more than mere negligence; it involves a dishonest purpose ... [B]ad faith may be overt or may consist of inaction, and it may include evasion of the spirit of the bargain ..." (Citations omitted; internal quotation marks omitted.) *Keller v. Beckenstein*, 117 Conn.App. 550, 563-64, 979 A.2d 1055 (2009).

As discussed above, the plaintiff has properly pleaded a breach of contract in count one. Furthermore, the complaint alleges that Ronald Ruotolo's actions "were done with premeditation, willfully and by design in order to fraudulently deprive the [limited liability company] and [Rene Ruotolo] ..." These facts, if believed, would support a finding of bad faith.

The court finds that the plaintiff has sufficiently pleaded a breach of the implied covenant of good faith and fair dealing. Accordingly, the motion to strike count five should be denied.

IV Counts Eight and Eighteen

As to count eight, the defendants argue that the plaintiff fails to allege that Mechanical owed a fiduciary duty to Plumbing, Realty or any of their members. In her memorandum in opposition, the plaintiff concedes that she has failed to allege properly a cause of action against Mechanical. The plaintiff also alleges in count eight a breach of fiduciary duty by Ronald Ruotolo against the plaintiff individually. The defendants fail to address this claim in their motion to strike. "Practice Book § 10-41 requires that a motion to strike raising a claim of insufficiency shall separately set forth each such claim of insufficiency and shall distinctly specify the reason or reasons for each such claimed insufficiency. Motions to strike that do not specify the grounds of insufficiency are fatally defective and, absent a waiver by the party opposing the motion, should not be granted." (Internal quotation marks omitted.) *Stuart v. Freiberg*, 102 Conn.App. 857, 861, 927 A.2d 343 (2007).

***7** Accordingly, the court finds that the motion to strike count eight should be granted as to the allegations set forth against Ruotolo Mechanical, Inc., but denied as to the remaining allegations against Ronald Ruotolo.

A similar situation arises in count eighteen. The defendants argue that this count should be stricken because the plaintiff fails to allege that Mechanical owed a fiduciary duty to Plumbing, Realty or any of their members. In her memorandum, the plaintiff concedes that she has failed to allege a proper cause of action against Mechanical. Nonetheless, as in count eight, the plaintiff also alleges a breach of fiduciary duty by Ronald Ruotolo against Plumbing and Realty. The defendants again fail to address this claim in their motion to strike.

Thus, as in count eight, the court finds that the motion to strike as to count eighteen should be granted as to the allegations set forth against Ruotolo Mechanical, Inc., but denied as to the allegations relating to Ronald Ruotolo.

V. Count Eleven

With regard to count eleven, the defendants argue that the plaintiff's claim for equitable relief under General Statutes § 34-141(e) is legally insufficient because the statutory authority relied upon by the plaintiff in that count does not provide the relief the plaintiff is seeking. The plaintiff responds by arguing that the statute applies to Plumbing and Realty, but she does not address the question of whether § 34-141(e) provides for the imposition of a trust.

Section 34-141 provides in relevant part, "(e) Unless otherwise provided in writing in the articles of organization or the operating agreement, every member and manager must account to the limited liability company and hold as

trustee for it any profit or benefit derived by that person, without the consent of more than one-half by number of the disinterested managers or the majority in interest of the disinterested members, from (1) any transaction connected with the conduct or winding up of the limited liability company or (2) any use by the member or manager of its property, including, but not limited to, confidential or proprietary information of the limited liability company or other matters entrusted to the person as a result of his status as a member or manager." The statute requires that every member and manager of a limited liability company must hold as trustee for it any profit derived by that person, but does not empower the court to impose a trust against a member or manager for violating the statute. Thus, § 34-141(e) establishes the statutory fiduciary duties of members in a limited liability company, but does not in itself provide for the imposition of a trust.

A number of trial court decisions have cited § 34-141 to evaluate claims that a party breached a fiduciary duty. See *Fine v. Bork*, Superior Court, judicial district of Hartford, Docket No. CV 0585665 (December 6, 1999, Booth, J.); *Venditti v. Giansiracusa*, Superior Court, judicial district of Hartford, Docket No. CV 03 0825283 (November 6, 2003, Rittenband, J.T.R.) [35 Conn. L. Rptr. 741]; *Savanna Investors, LLC v. Vaughn*, Superior Court, complex litigation docket at Stamford, Docket No. X08 CV 08 401296 (July 30, 2008, Jennings, J.) [46 Conn. L. Rptr. 369]. The plaintiff has provided no authority for the proposition that § 34-141 may form the basis for the imposition of a trust, and research reveals none.

***8** Accordingly, the court finds that granting the motion to strike count eleven is in order.

VI. Conclusion

As stated above, the court finds that the motion to strike should be and hereby is denied as to the following counts: one, two, five, and twelve.

The court further finds that the motion to strike should be denied as to the claims against Ronald Ruotolo in counts eight and eighteen, and granted as to the claims against the business entity in those counts.

Finally, the motion to strike count eleven is granted.

All Citations

Not Reported in A.2d, 2009 WL 5698124

2012 WL 6924430

Superior Court of Connecticut,
Judicial District of New London.

Eric J. SHAMES
v.
Joshua PROTTAS et al.

No. CV126013378.
|
Dec. 27, 2012.

Attorneys and Law Firms

Matthew James Corcoran, Matthew J. Corcoran, Hamden, CT, for Eric J. Shames.

COSGROVE, J.

FACTS

***1** On July 11, 2012, the plaintiff, Eric J. Shames, filed a five-count revised complaint, involving a dispute among partners of a foreign partnership, against the defendants, Joshua Prottas, Skender Ibric, Wisp Partners and the city of Norwich. [1] In the first, second, third and fourth counts, the plaintiff seeks an accounting, dissolution of the partnership, appointment of a receiver, and partition or sale of the Wisp Partnership properties, respectively. In the fifth count, the plaintiff brings suit for a breach of fiduciary duty against Prottas. The plaintiff alleges the following facts. The plaintiff, Prottas and Ibric are residents of New York and they formed WISP Partners, a New York partnership with an office in New York, in 1999. WISP Partners owns and manages a commercial real estate property located at 320 West Thames Street in Norwich, Connecticut. Prottas has been acting as the managing general partner of Wisp Partners. The plaintiff has unsuccessfully demanded an accounting of income, expenses, and other payments from the managing general partner. Prottas has neglected to include the partners in the partnership decisions and has mismanaged the property. Specifically, the property is not insured and was the subject of arson committed by a tenant on October 26, 2011, which was never reported to the plaintiff. Furthermore, the partnership has been the subject of actions prosecuted by the co-defendant, the city of Norwich.

On July 25, 2012, the defendants filed a motion to strike and a memorandum of law in support of the motion to strike counts one, two, three and four of the plaintiff's revised complaint. The plaintiff filed a memorandum of law in opposition to the defendants' motion to strike on August 23, 2012. The matter was heard at short calendar on September 24, 2012.

DISCUSSION

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves,* 262 Conn. 480, 498, 815 A.2d 1188 (2003). In ruling on a motion to strike, the court takes "the facts to be those alleged in the [complaint] ... and ... construe[s] the [complaint] in the manner most favorable to sustaining its legal sufficiency." (Internal quotation marks omitted.) *New London County Mutual Ins. Co. v. Nantes,* 303 Conn. 737, 747, 36 A.3d 224 (2012). The motion to strike does not require the trial court to make any factual findings. *Id.* Rather, "[t]he role of the trial court in ruling on a motion to strike is to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action." (Internal quotation marks omitted.) *Coe v. Board of Education,* 301 Conn. 112, 117, 19 A.3d 640 (2011). Although "[a] motion to strike admits all facts well pleaded; it does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings." (Internal quotation marks omitted.) *Faulkner v. United Technologies Corp.,* 240 Conn. 576, 588, 693 A.2d 293 (1997).

Count Two: Dissolution

***2** The defendants first argue that count two of the revised complaint is legally insufficient because the court lacks authority to dissolve a foreign partnership. The plaintiff counters that the court does have authority to dissolve a foreign partnership because he has invoked the equitable power of the court to do so.

In the revised complaint, the plaintiff seeks to have this court issue a decree of dissolution of Wisp Partners, a foreign

partnership, under General Statutes §§ 34–339(b)(2)(C) and 34–372(5). Neither of these sections expressly authorize the court to dissolve a foreign partnership, nor do they expressly prohibit the court from doing so. A review of Connecticut case law does not reveal any relevant authority that addresses the court's power to dissolve a foreign partnership under these statutes. Thus, a statutory analysis of these sections is necessary to determine whether this court has the power to do so.

When interpreting a statute, General Statutes § 1–2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." "[W]e seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply ... In seeking to determine that meaning, General Statutes § 1–2z directs us first to consider the text of the statute itself and its relationship to other statutes." (Internal quotation marks omitted .) *Felician Sisters of St. Francis of Connecticut, Inc. v. Historic District Commission,* 284 Conn. 838, 847, 937 A.2d 39 (2008). "[I]n interpreting a statute, we do not interpret some clauses of a statute in a manner that nullifies other clauses but, rather, read the statute as a whole in order to reconcile all of its parts ... Every word and phrase is presumed to have meaning, and we do not construe statutes so as to render certain words and phrases surplusage." (Internal quotation marks omitted.) *Ugrin v.. Cheshire,* 307 Conn. 364, 383, 54 A.3d 532 (2012).

Section 34–339(b)(2)(C) [2] gives a partner the right to compel a dissolution and winding up of a partnership. Section 34–372 provides in relevant part: "A partnership is dissolved and its business must be wound up, only ... (5)[o]n application by a partner, a judicial determination that: (A) The economic purpose of the partnership is likely to be unreasonably frustrated; (B) another partner has engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with that partner; or (C) it is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement ..." Thus, under §§ 34–339(b)(2)(C) and 34–372(5), the court has the power to dissolve a "partnership" if certain prerequisites are met. General Statutes § 34–301(12), as amended by No. 11–146 of the 2011 Public Acts, defines "partnership" broadly as "an association of two or more persons to carry on as co-owners a business for profit formed under § 34–314, [3] predecessor law *or comparable law of another jurisdiction* ..." (Emphasis added.) Based on this definition, therefore, § 34–372 authorizes a court of this state to dissolve a foreign partnership because, pursuant to the definition of partnership in § 34–301(12), which includes partnerships formed pursuant to the laws of a foreign state, it applies to both foreign and domestic partnerships. By contrast, § 34–301(7) explicitly defines "foreign registered limited liability partnership" as "a partnership formed pursuant to an agreement governed by the laws of any state other than this state and registered or denominated as a registered limited liability partnership ..." The existence of this definition demonstrates that the legislature was clearly capable of specifically prescribing rules applicable to foreign partnerships within this state but elected not to differentiate between foreign and domestic partnerships that are not foreign registered limited liability partnerships. Accordingly, based on the language of § 34–372 and related statutes, this court has the statutory power to dissolve a foreign partnership that is not a foreign registered limited liability partnership.

***3** Furthermore, at least one judge of the Superior Court has determined that it has the equitable power to determine a request for dissolution of a foreign partnership. See *Saluki Investors v. GP Station Partners,* Superior Court, judicial district of Stamford–Norwalk, Docket No. CV 93 0129471 (June 17, 1993, Rush, J.). An examination of case law outside Connecticut also supports the conclusion that the court has authority to dissolve a foreign partnership pursuant to its equitable powers. The New York Appellate Division considered a similar situation where all the parties were residents of a foreign state, Pennsylvania, and the plaintiff sought a dissolution of the partnership, an accounting of all partnership dealings, the appointment of a receiver and liquidation of the partnership assets. *Rothstein v. Rothstein,* 272 App.Div. 26, 27, 68 N.Y.S.2d 305, aff'd, 297 N.Y. 705, 77 N.E.2d 13 (1947). The court stated that it has the authority to "entertain commonlaw actions of a commercial nature between nonresidents." *Id.,* at 28. The court also held that it has *discretion* to decline jurisdiction for actions between nonresidents which "call for relief of a kind which makes it inconvenient or impractical for the court to act." *Id.* Although, the court ultimately declined jurisdiction in that case, it did so because the action presented problems and difficulties with respect to directing and overseeing the dissolution and liquidation of the partnership. *Id.* Among the difficulties

pointed out by the court, it specifically noted the impossibility of appointing a receiver for property located in Pennsylvania. *Id.* Unlike in *Rothstein,* in the present case, the real property owned by WISP Partners is located within Connecticut. Thus, it would not be inconvenient or impractical for this court to order a dissolution. [4]

The cases cited by the defendants in support of its motion to strike count two are inapposite. Our Supreme Court has held that "[i]n the absence of statute, a *corporation* cannot be dissolved by judicial decree, except in an action commenced in the name of the State which created it." (Emphasis added.) *Low v. Pressed Metal Co.,* 91 Conn. 91, 94, 99 A. 1 (1916). Thus, "[c]ourts have no power to dissolve *corporations* at the instance of private suitors except if and as authorized by statute." (Emphasis added.) *In re Litchfield County Agricultural Soc.,* 91 Conn. 536, 539, 100 A. 356 (1917). The defendants' reliance on these decisions are misplaced as they only support the assertion that the court lacks the authority to dissolve foreign corporations. The present suit, however, involves the court's authority to dissolve a foreign partnership. Thus, these cases do not support the defendant's assertion that this court lacks the requisite authority to dissolve a foreign partnership.

Therefore, for these reasons, this court has the requisite authority to dissolve a foreign partnership. Accordingly, the motion to strike is denied as to this count.

Count Three: Appointment of Receiver

***4** The defendants argue that count three of the revised complaint is legally insufficient on the ground that the appointment of a receiver that the plaintiff seeks is ancillary to the dissolution of the partnership, which the court lacks the power to do. The plaintiff objects on the ground that the appointment of a receiver is not ancillary to the dissolution of the partnership.

The plaintiff's complaint seeks to have a receiver appointed pursuant to General Statutes § 52–509. This statute sets forth a condition precedent that the partnership must first be dissolved before the court may appoint a receiver. Specifically, § 52–509(a) allows partners to apply for the appointment of a receiver to hold the business and all of the property belonging to the partnership "[w]hen any partnership is dissolved ..." "The application for a receiver is addressed to the sound legal discretion of the court, to be exercised with due regard to the relevant statutes and rules, and such exercise is not to be disturbed lightly nor unless abuse of discretion or other material error appears." *Chatfield Co. v. Coffey Laundries, Inc.,* 111 Conn. 497, 501, 150 A. 511 (1930); *Masterton v. Lenox Realty Co.,* 127 Conn. 25, 33, 15 A.2d 11 (1940); *Antonio v. Johnson,* 113 Conn.App. 72, 77, 996 A.2d 261 (2009). Here, the statute that the plaintiff invokes clearly does not authorize the court to order an appointment of a receiver prior to the dissolution of the partnership. Nevertheless, as the dissolution count has not been stricken, the claim seeking appointment of a receiver is not legally insufficient as the court could appoint a receiver pursuant to § 52–509 if it ultimately orders the dissolution of WISP Partners. Accordingly, the motion to strike is denied as to this count.

Count Four: Partition of the Property

The defendants argue that count four of the revised complaint is legally insufficient on the ground that the partition of the property that WISP Partners owns is ancillary to the dissolution of the partnership. The plaintiff objects on the ground that the partition relief is not ancillary to the dissolution of the partnership.

General Statutes § 52–495 allows for compulsory partition by physical division for any person "holding real property as a joint tenant, tenant in common, coparcener or tenant in tail ..." *Fernandes v. Rodriguez,* 255 Conn. 47, 56, 761 A.2d 1283 (2000). In the present case, however, the plaintiff does not allege that he is a joint tenant, tenant in common, coparcener or tenant in tail of the subject property. Instead, the plaintiff alleges that the commercial real estate located at 320 West Thames Street, Norwich, Connecticut is a partnership asset. Thus, § 52–495 is not applicable in this case to partition the subject property.

Section 34–315 explicitly provides that "[p]roperty acquired by the partnership is property of the partnership and not of the partners individually." Additionally, § 34–347 provides: "The only transferable interest of a partner in the partnership is the partner's share of the profits and losses of the partnership and the partner's right to receive distributions. See also *Gorelick v. Montanaro,* 119 Conn.App. 785, 804, 990 A.2d 371 (2010)("Under Connecticut's prior and current Uniform Partnership Act, partnership realty is considered personalty with respect to any *individual partner's rights therein.*"). Thus, a partner has no realty interest in real property owned

by the partnership, but rather has a personal interest therein. *Wheeler v. Polasek*, 21 Conn.App. 32, 34, 571 A.2d 129 (1990). Consequently, the property located at 320 West Thames Street is not the real property of the plaintiff, Prottas or Ibric. Rather, the real property is owned wholly by WISP Partners. Although the plaintiff has not alleged sufficient facts to partition the property under § 52–495 prior to the dissolution of the partnership, the property can be partitioned to the individual partners if WISP Partners is ultimately dissolved in this action. Accordingly, although the defendants are correct in their assertion that the claim seeking partitioning of the property is ancillary to the dissolution claim, the partition claim is not legally insufficient for that reason because the court has the power to dissolve a foreign partnership. The motion to strike, therefore, must be denied as to this count.

Count One: Accounting

***5** The defendants move to strike count one of the revised complaint on the ground that the court lacks the requisite authority to grant an accounting because such relief is ancillary to the dissolution of the partnership. They also argue that the accounting relief should not be bifurcated from the dissolution action. The plaintiff opposes the defendants' motion on the ground that the accounting relief is not ancillary to the dissolution of the partnership.

"Each partner owes to his associates the duty of rendering true accounts and full information about everything which affects the partnership. If he fails to perform this duty, his associates are entitled to maintain a suit for an accounting against him." *Weidlich v. Weidlich*, 147 Conn. 160, 164, 157 A.2d 910 (1960). "An action for an accounting calls for the application of equitable principles." *Travis v. St. John*, 176 Conn. 69, 74, 404 A.2d 885 (1978). "Courts of equity have original jurisdiction to state and settle accounts, or to compel an accounting, where a fiduciary relationship exists between the parties and the defendant has a duty to render an account." (Internal quotation marks omitted.) *Mankert v. Elmatco Products, Inc.*, 84 Conn.App. 456, 460, 854 A .2d 706, cert. denied, 271 Conn. 925, 859 A.2d 580 (2004). "To support an action of accounting, one of several conditions must exist. There must be a fiduciary relationship, or the existence of a mutual and/or complicated accounts, or a need of discovery, or some other special ground of equitable jurisdiction such as fraud ... The right to compel an account in equity exists not only in the case of those relationships which are traditionally regarded as those of trust and confidence, but also in those informal relations which exist whenever one person trusts in, and relies upon, another. The relationship between ... parties to a business agreement ... [has] ... been deemed to involve such confidence and trust so as to entitle one of the parties to an accounting in equity ." (Citation omitted.) *Id.*, at 460–61.

"It would be an intolerable proposition to assert that any local business was beyond the original equity jurisdiction of our courts merely because it was conducted by a foreign corporation. The principle that courts will not interfere in what are vaguely called the internal affairs of a foreign corporation, must yield to the larger and more important principle that all who choose to engage in business within the State ... necessarily subject such business to the jurisdiction of the courts as fully as if it were conducted by our own citizens or corporations." *Low v. Pressed Metal Co., supra*, 91 Conn. at 95–96.

In the present case, WISP Partners is alleged to be a foreign partnership that owns and operates a local business within this state, namely a commercial real estate property in Norwich, Connecticut. Additionally, the complaint sufficiently alleges that a fiduciary duty exists between the plaintiff, Ibric and Prottas as they are copartners of Wisp Partners. Furthermore, the plaintiff alleges that the plaintiff and the defendants are parties to a business agreement, specifically the partnership agreement. See *Mankert v. Elmatco Products, Inc., supra*, 84 Conn.App. at 460 ("The relationship between ... parties to a business agreement ... [has] ... been deemed to involve such confidence and trust so as to entitle one of the parties to an accounting in equity"); see also *C & S Research Corp. v. Holton Co.*, 36 Conn.Sup. 619, 621–22, 422 A.2d 331 (1980) (discussing various cases in which a business relationship was deemed sufficient to confer the right of an accounting). Thus, the plaintiff has alleged a legally sufficient claim for an accounting.

***6** Furthermore, the cases cited above also demonstrate that a claim for an accounting is a separate and independent action and the dissolution of the business is not a prerequisite to an order for accounting. Therefore, regardless of whether the plaintiff's claim seeking dissolution of the partnership is stricken, the plaintiff's complaint, read in the light most favorable to sustaining its legal sufficiency, supports a claim for an accounting and will not be stricken for the reasons asserted by the defendants.

CONCLUSION

For the foregoing reasons, the defendants' motion to strike counts one, two, three and four is denied.

All Citations

Not Reported in A.3d, 2012 WL 6924430, 55 Conn. L. Rptr. 310

Footnotes

1 Prottas, Ibric and Wisp Partners filed this motion to strike and will be collectively referred to as “the defendants” in this memorandum.

2 General Statutes § 34–339(b) provides in relevant part: “A partner may maintain an action against the partnership or another partner for legal or equitable relief ... to: (2)[e]nforce the partner's rights under sections 34–300 to 34–399, inclusive, including ... (C) the partner's right to compel a dissolution and winding up of the partnership business under section 34–372 ...”

3 General Statutes § 34–314(a) provides in relevant part: “[T]he association of two or more persons to carry on as co-owners a business or profit forms a partnership, whether or not the persons intended to form a partnership.”

4 Moreover, such considerations do not implicate the court's power to act, but relate to the issue of venue. By failing to raise the issue of improper venue in a timely motion to dismiss, the defendants have waived any claim of improper venue pursuant to Practice Book § 10–32, which provides in relevant part: “Any claim of ... improper venue ... is waived if not raised by a motion to dismiss filed in the sequence provided in Sections 10–6 and 10–7 and within the time provided by Section 10–30.”

Mark Welzenbach v. The Hartford Financial Services Group, Inc.

CV064021525, Opinion No.: 96923

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF HARTFORD

2007 Conn. Super. LEXIS 256

January 25, 2007, Decided
January 25, 2007, Filed

NOTICE: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff terminated employee filed a complaint alleging claims against defendant former employer sounding in, inter alia, breach of contract, recklessness, and a violation of the state unfair trade practices statute. The former employer filed a motion to strike each of those claims.

OVERVIEW: Plaintiff terminated employee was an employee of the former employee over a nearly 10-year period until his employment was terminated. He then filed a complaint in which he claimed that while he was employed, he was offered jobs at other companies but that the former employer persuaded him to remain by assuring him of its commitment to him and awarding him special incentive packages with long-vesting periods. The terminated employee claimed that at the time he was terminated, he was on the verge of vesting in several hundred thousand dollars of incentives. He sued and alleged, inter alia, breach of contract, recklessness, and violation of the Connecticut Unfair Trade Practices Act, *Conn. Gen. Stat. § 42-110a et seq* (CUTPA). The former employer filed a motion to strike those claims. The trial court found that although the terminated employee argued that he was discharged so that the former employer would not have to pay certain compensation to him, he did not plead sufficient facts in the complaint in that regard. It also found that he did not plead proper facts to show a extreme departure from ordinary care, and that CUTPA did not apply to an employer-employee relationship.

OUTCOME: The trial court granted the motion to strike in its entirety.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Strike > General Overview
[HN1] The purpose of a motion to strike is to contest the legal sufficiency of the allegations of any complaint to state a claim upon which relief can be granted. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. A court takes the facts to be those alleged in the complaint and construes the complaint in the manner most favorable to sustaining its legal sufficiency. Thus,

if facts provable in the complaint would support a cause of action, the motion to strike must be denied. A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged.

Labor & Employment Law > Employment Relationships > Employment at Will > Employees
Labor & Employment Law > Wrongful Termination > Public Policy
[HN2] Termination of an "at will" employee solely to avoid vesting of certain rights to compensation violates public policy and states a claim for wrongful discharge. The rationale behind that rule is to uphold the public policy of preventing overreaching by employers and the forfeiture by employees of benefits earned by the rendering of substantial services.

Torts > Negligence > Defenses > Comparative Negligence > Intentional & Reckless Conduct
Torts > Negligence > Standards of Care > Reasonable Care > General Overview
[HN3] To determine whether a plaintiff's complaint states a cause of action sounding in recklessness, courts look first to the definitions of wilful, wanton, and reckless behavior. Recklessness is a state of consciousness with reference to the consequences of one's acts. It is more than negligence, more than gross negligence. The state of mind amounting to recklessness may be inferred from conduct. But in order to infer it there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. Wanton misconduct is reckless misconduct. It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action. While courts have attempted to draw definitional distinctions between the terms wilful, wanton, or reckless, in practice the three terms have been treated as meaning the same thing. The result is that willful, wanton, or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. It is at least clear that such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
[HN4] See *Conn. Gen. Stat. § 42-110a.*

JUDGES: Jane S. Scholl, J.

OPINION BY: Jane S. Scholl

OPINION

MEMORANDUM OF DECISION RE DEFENDANT'S MOTION TO STRIKE (# 103)

The Defendant has moved to strike the First, Fifth and Sixth Counts of the complaint in this matter. The complaint alleges that the Plaintiff was an employee of the Defendant ("The Hartford") from August 1995 to when he was terminated on or about July 2005. He claims that during that time he was offered jobs at other companies but the Defendant persuaded him to remain with The Hartford by assuring him of its commitment to him and awarding him special incentive packages with long vesting periods. He was also assured, at one point, that he would become head of the Defendant's claims organization. As a result, the Plaintiff rejected a competing offer. Later the Plaintiff was told the qualifications for the job had changed and it was unlikely he would become head of claims. In July 2005 the Defendant terminated the Plaintiff. The Plaintiff claims that at that time he was on the verge of vesting in several hundred [*2] thousand dollars of incentives.

In the First Count the Plaintiff claims breach of contract, in the Fifth Count he claims recklessness, and in the Sixth Count he claims a violation of the Connecticut Unfair Trade Practices Act ("CUTPA").

[HN1] "The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted . . . A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court . . . We take the facts to be those alleged in the complaint . . . and we construe the complaint in the manner most favorable to sustaining its legal sufficiency . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied . . . A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Citations omitted; internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves, 262 Conn. 480, 498, 815 A.2d 1188 (2003).*

The Defendant moves to strike the First Count because it fails to state a claim [*3] for breach of contract in that it fails to allege that The Hartford agreed to undertake some form of actual contractual commitment to the Plaintiff and further fails to contain the material terms essential to a contract. In response, the Plaintiff argues that his claim in the First Count is one for wrong-

ful discharge and/or breach of the covenant of good faith and fair dealing. The Plaintiff claims that the allegations of the complaint allege that he was fired when he was on the verge of vesting in several hundred thousands of dollars in long-term incentives and that the termination of employment in order to prevent the vesting of benefits is actionable as a wrongful termination and breach of contract. The Plaintiff cites *Nofs v. Gemini Network, Inc.*, Superior Court, Judicial District of Hartford at Hartford, Docket No. CV 02-0818599S (Cohn, J, Feb. 4, 2003) in support of his position. There the court noted that "[s]everal Superior Court decisions have held that the [HN2] termination of an 'at will' employee solely to avoid vesting of certain rights to compensation violates public policy and states a claim for wrongful discharge. See *Cook v. Alexander & Alexander, 40 Conn. Sup. 246, 248, 488 A.2d 1295 (1985)* [*4] ('By alleging that the plaintiff was discharged in order to avoid payment of bonuses and the vesting of thrift plan benefits, the plaintiff has sufficiently alleged a wrongful discharge within the contemplation of Sheets'); *Okon v. Medical Marketing Group, Inc., Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 93 306032S, 1994 Conn. Super. LEXIS 2103 (August 18, 1994, Pittman, J.) (12 Conn. L. Rptr. 228)* (a complaint alleging that plaintiff's employment was terminated in order to prevent the vesting of certain rights to compensation which, if vested, would be enforceable under the wage protection statutes states a cause of action for wrongful termination); *Leue v. Computer Sciences Corp., Superior Court, judicial district of Hartford at Hartford, Docket No. CV 01 811784 , 2002 Conn. Super. LEXIS 824 (March 15, 2002, Wagner, J.) (31 Conn. L. Rptr. 528)* ('This Court is in agreement with the Superior Court cases that view the wage statutes as expressing a public policy against the withholding of wages earned. Accordingly, a plaintiff may plead a wrongful discharge claim by alleging that the plaintiff was discharged so as to avoid the payment of other compensation that, if vested, would have accrued.') The rationale [*5] behind these holdings is to uphold the public policy of preventing overreaching by employers and the forfeiture by employees of benefits earned by the rendering of substantial services. *Fortune v. National Cash Register Company, 373 Mass. 96, 364 N.E.2d 1251, 1257 (Mass. 1977)*." Although the case law does support such a claim as that which the Plaintiff seeks to frame in his opposition to the Motion to Strike, the allegations of the complaint itself do not state that the Plaintiff was discharged in order to avoid the payment of benefits. Therefore the Motion to Strike the First Count is granted.

The Defendant moves to strike the Fifth Count because it fails to allege a claim of recklessness in that it does not allege conduct which meets the standard of recklessness as articulated by our Supreme Court. In that Count the Plaintiff incorporates the allegations of the First Count and adds: "The plaintiff relied on the defendant's representations as defendant intended. Notwithstanding same, defendant terminated plaintiff in reckless indifference to the rights and obligations owed to plaintiff and the consequences such termination would cause the plaintiff and his family, [*6] all to plaintiff's special loss and damages." The Supreme Court has stated that: [HN3] "To determine whether the plaintiffs' amended complaint states a cause of action sounding in recklessness, we look first to the definitions of wilful, wanton and reckless behavior. Recklessness is a state of consciousness with reference to the consequences of one's acts . . . It is more than negligence, more than gross negligence . . . The state of mind amounting to recklessness may be inferred from conduct. But in order to infer it there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them . . . Wanton misconduct is reckless misconduct . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action . . . 'While we have attempted to draw definitional distinctions between the terms wilful, wanton or reckless, in practice the three terms have been treated as meaning the same thing. The result is that willful, wanton, or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure [*7] from ordinary care, in a situation where a high degree of danger is apparent . . . It is at least clear . . . that such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention.' (Citations omitted; internal quotation marks omitted.) *Craig v. Driscoll, supra, 64 Conn. App. 699, 720-21, 781 A.2d 440*." *Craig v. Driscoll, 262 Conn. 312, 342-3, 813 A.2d 1003 (2003)*. The factual allegations of the complaint here that the Defendant terminated the Plaintiff when he was on the verge of being vested in certain benefits and that the Defendant did not keep its promise to make him head of the claims department do not meet this standard. The Plaintiff's reliance on the court's decision in *Tang v. Bou-Fakhreddine, 75 Conn. App. 334, 815 A.2d 1276 (2003)* is misplaced since the court there found the allegations of recklessness sufficient only in light of the defendant's default. Therefore the Motion to Strike the Fifth Count is granted.

In the Sixth Count the Plaintiff alleges a claim under the Connecticut Unfair Trade Practices Act ("CUTPA"). [*8] The Defendant moves to strike this claim because CUTPA does not apply to the employer-employee relationship. The Plaintiff agrees, but argues that CUTPA does apply to conduct outside of the employer-employee relationship and such conduct is alleged here in that he

alleges that: " . . . defendant threatened to negatively impact plaintiff's employment history in such a manner as to intimidate and dissuade plaintiff from otherwise seeking to assert his rights afforded by law . . ." The Plaintiff claims that the Defendant's threats and interference with his ability to sell or distribute his services as a potential employee of another employer constitute trade or commerce within the meaning of CUTPA. *General Statutes § 42-110a* provides: [HN4] " 'Trade' and 'commerce' means the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state." In a similar case, *Watt v. Ford Consumer Finance Co.*, Superior Court, Judicial District of Fairfield at Bridgeport, Docket No. CV95 32 35 72 [*9] S (Hauser, J., Jul. 31, 1996), the court stated: "After his termination, Watt began to look for other employment opportunities. On several occasions, potential employers contacted Ronnow or other Ford employees for information concerning Watt's job performance. In response to these inquiries, Ronnow allegedly made several false, fraudulent, and unprivileged defamatory statements about Watt's integrity. The court finds that the allegations in the fourth count of the revised complaint arise from the employer-employee relationship and even if that is not so, the court finds that the fourth count of the revised complaint does not touch upon trade or commerce." The allegations here likewise do not arise from trade or commerce but only from the employer-employee relationship between the Plaintiff and the Defendant. To hold otherwise would encompass within the definition of trade or commerce every job application, recommendation or inquiry by a future employer to a past employer.

The Motion to Strike is granted in its entirety.

Jane S. Scholl, J.

2005 WL 3623815
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Ansonia-Milford.

WILLIAM RAVEIS REAL ESTATE
v.
CENDANT MOBILITY
CORPORATION fka HFS Services, Inc.

No. CV054002709S.
|
Dec. 6, 2005.

Attorneys and Law Firms

Wake See Dimes & Bryniczka, Westport, for William Raveis Real Estate Inc.

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STEVENS, J.

STATEMENT OF THE CASE

***1** On June 2, 2005, the plaintiff, William Raveis Real Estate, Inc., filed a five-count revised complaint against the defendant, Cendant Mobility Services Corporation, alleging the following facts. The plaintiff is a Connecticut corporation licensed as a real estate broker. The defendant is a Delaware corporation with its principal place of business at Danbury, Connecticut and was formerly known as HFS Mobility Services, Inc. The defendant provided a range of employee relocation and related services to corporate, government and individual clients and formed a network of real estate firms known as the "HFS Mobility Broker Network."

According to the complaint, on October 27.1997, the parties entered into a written agreement with a five-year term that appointed the plaintiff as a member of the HFS Mobility Broker Network. Pursuant to this agreement the plaintiff was appointed sole principal broker for the defendant to receive 80 percent of all available business in Connecticut. In addition, the agreement requires the defendant to make available for audit its records regarding business activity within the plaintiff's territory. The plaintiff maintains that it performed all the terms of the agreement including paying an annual $35,000 "administrative fee."

Count one of the complaint alleges a breach of an express written contact. Count two alleges a breach of the implied covenant of good faith and fair dealing. Count three alleges unjust enrichment. Count four alleges that the unique relationship between the parties created by the agreement requires specific performance in order for the plaintiff to calculate its damages. Finally, count five alleges that the plaintiff is entitled to an accounting.

On July 15, 2005, the defendant filed a motion to strike counts three, four and five of the revised complaint. The defendant has submitted a memorandum of law in support of the motion. On August 8, 2005, the plaintiff filed a memorandum of law in opposition to the motion.

DISCUSSION

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy LLC v. Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). The role of the trial court in ruling on a motion to strike is "to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action." (Internal quotation marks omitted.) *Dodd v. Middlesex Mutual Assurance Co.*, 242 Conn. 375, 378, 698 A.2d 859 (1997). "In ruling on a motion to strike, the court is limited to the facts alleged in the complaint." (Internal quotation marks omitted.) *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 580, 693 A.2d 293 (1997). "[G]rounds other than those specified should not be considered by the trial court in passing upon a motion to strike ..." *Gazo v. Stamford*, 255 Conn. 245, 259, 765 A.2d 505 (2001).

Count Three-Unjust Enrichment

***2** In count three, the plaintiff alleges unjust enrichment, but incorporates in this count all the facts alleging the existence of an express contract. The defendant moves to strike count three

on the ground that unjust enrichment is unavailable when a complaint is based upon the alleged existence and breach of an enforceable contract.

In response, the plaintiff contends that the unjust enrichment claim is a proper alternative theory of relief. According to the plaintiff, the contractual relationship between the parties will "inform, aid and guide the future fact finder" as to whether the defendant has been unjustly enriched. The plaintiff further argues that the "contract is not identified for purposes of being enforced in the unjust enrichment count, but for the purpose of framing the issues and affording context to the claim." The court is unpersuaded by the plaintiff's position.

"Unjust enrichment applies whenever justice requires compensation to be given for property or services rendered under a contract, and no remedy is available by an action on the contract ... Indeed, lack of a remedy under the contract is a precondition for recovery based upon unjust enrichment." (Citation omitted; internal quotation marks omitted.) *Gagne v. Vaccaro*, 255 Conn. 390, 401, 766 A.2d 416 (2001). "While proof of an enforceable contract might preclude application of an unjust enrichment theory, the plaintiff may be unable to prove an enforceable contract and, at least in the early stages of the proceedings, is entitled to plead inconsistent theories." *Consumer Incentive Services International, Inc. v. Memberworks, Inc., Superior Court*, judicial district of Fairfield, Docket No. CV 990362655 (April 25, 2000, Melville, J.).

While a party may plead in the alternative, alternative pleadings must be set forth in separate counts: Practice Book § 10-25 provides: "The plaintiff may claim alternative relief, based upon an alternative construction of the cause of action." Further, Practice Book § 10-26 provides: "Where separate and distinct causes of action as distinguished from separate and distinct claims for relief founded on the same cause of action or transaction, are joined, the statement of the second shall be prefaced by the words *Second Count*, and so on for the others; and the several paragraphs of each count shall be numbered separately beginning in each count with the number one."

"It has been held in several recent Superior Court cases that allegations of [an] express contract between the parties incorporated into a count stating a claim for unjust enrichment cause a violation of the rule that those alternative causes of action must be pleaded in separate counts." *Burke v. The Boatworks, Inc.*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 044001838 (July 26, 2005, Jennings, J.) (granting motion to strike unjust enrichment claim based upon plaintiff incorporating allegations of breach of express contract between plaintiff and defendant into claim).

***3** By incorporating allegations of the previous counts, the plaintiff alleges in paragraph four of count three that on or about "October 22, 1997, [the parties] entered into a written HFS Mobility Services, Inc. Strategic Alliance Agreement ..." The plaintiff further alleges in paragraph thirteen that "[the defendant] has breached the Agreement ..." Thus, the plaintiff clearly alleges the existence and breach of an express contract in the count seeking unjust enrichment, contrary to the rule that alternative causes of action must be pleaded in separate counts. In short, the plaintiff may plead unjust enrichment in the alternative, but this is not accomplished by incorporating into this count all the allegations of an express contract. Such a complaint does not involve alternative pleading, but involves legally inconsistent pleading.

Accordingly, the motion to strike count three is granted.

Count Four-Specific Performance and Injunction

The defendant moves to strike count four on the grounds that the complaint, "purporting to allege a cause of action ... is more properly a request for a relief ..." Additionally, the defendant asserts that the plaintiff has "not alleged the existence of a contract that is still in force and can be specifically performed." The defendant argues that since the contract at issue is no longer in effect, specific performance is not an available remedy.

In response, the plaintiff counters that specific performance is a form of injunctive relief not available as a matter of right but based on "equitable considerations." The plaintiff further argues that "courts of equity will look to the substance of the transaction, to the purpose of the agreement and the real understanding of the parties, whether expressed in the contract or not." The plaintiff asserts that in reading the allegation "broadly and realistically," count four provides a "legally sufficient claim for specific performance." Again, the court finds no merit in the plaintiff's position.

"[T]he specific performance remedy is a form of injunctive decree in which the court orders the defendant to perform the contract ... The specific performance decree originated in the old equity courts and continues today to be thought of as an

equitable remedy, with the usual attributes of such remedies ... The availability of specific performance is not a matter of right but depends rather upon an evaluation of equitable considerations." (Citation omitted; internal quotation marks omitted.) *Gager v. Gager & Peterson, LLP*, 76 Conn.App. 552, 560, 820 A.2d 1063 (2003).

In the present case, the agreement alleged in the plaintiff's complaint expired five years from the commencing date of October 22, 1997, and therefore, specific performance is not available. See *Liu v. C. Pierce Enterprises, LLC*, Superior Court, judicial district of Danbury, Docket No. CV 02 0010898 (January 5, 2004, Bellis, J.) (finding specific performance unavailable because the lease at issue had been terminated).

Count Five-Accounting by Way of Equitable Relief

***4** Finally, the defendant moves to strike count five on the ground that the plaintiff does not "state a cognizable cause of action." In support of the motion, The defendant argues that the heading " 'Account, by Way of Equitable Relief,' is insufficient to present the Court with the allegations required to state a claim" entitled to relief. The plaintiff counters that based on its alleged relationships, duties and obligations with the defendant, a legally sufficient equitable claim for accounting has been set forth. In this instance, the court agrees with the plaintiff.

"An action for an accounting calls for the application of equitable principles ... In an equitable proceeding, the trial court may examine all relevant factors to ensure that complete justice is done ... The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court." (Citations omitted; internal quotation marks omitted.) *Mankert v. Elmatco Products, Inc.*, 84 Conn.App. 456, 459, 854 A.2d 766, cert. denied, 271 Conn. 925, 859 A .2d 580 (2004).

"To support an action of accounting, *one* of several conditions must exist. There must be a fiduciary relationship, or the existence of a mutual and/or complicated accounts, or a need of discovery, or some other special ground of equitable jurisdiction such as fraud." (Emphasis in original; internal quotation marks omitted.) *Mankert v. Elmatco Products, Inc., supra*, 84 Conn.App. at 460.

"The right to compel an account in equity exists not only in the case of those relationships which are traditionally regarded as those of trust and confidence, but also in those informal relations which exist whenever one person trusts in, and relies upon, another. The relationship between ... parties to a business agreement ... [has] ... been deemed to involve such confidence and trust so as to entitle one of the parties to an accounting in equity ." (Internal quotation marks omitted.) *Mankert v. Elmatco Products, Inc., supra*, 84 Conn.App. at 460-61.

In the present case, the plaintiff has alleged a business relationship based upon a written agreement. Pursuant to the agreement, the plaintiff alleges that it was appointed sole principal broker for the defendant and authorized to act on behalf of the defendant. The plaintiff asserts that it was to receive a certain percentage of all business in Connecticut. The plaintiff further alleges that the defendant "agreed to make its records available" for audit. On the basis of these facts, which must be deemed true, the plaintiff has demonstrated a relationship between the parties that "is in and of itself sufficient to form the basis for ordering an accounting." (Internal quotation marks omitted.) *Mankert v. Elmatco Products, Inc., supra*, 84 Conn. at 461.

CONCLUSION

Therefore, for the foregoing reasons, the defendant's motion to strike is granted as to counts three and four and is denied as to count five of the plaintiff's revised complaint.

***5** So ordered this 1st day of December 2005.

All Citations

Not Reported in A.2d, 2005 WL 3623815

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